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PRINCIPLES

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PRECEDENTS

OF

HINDU LAW,

BEING

A COMPILATION OF PRIMARY RULES

RELATIVE TO

THE DOCTRINE OF INHERITANCE, CONTRACTS,
AND MISCELLANEOUS SUBJECTS;

AND

A SELECTION OF LEGAL OPINIONS

INVOLVING THOSE POINTS,

DELIVERED IN

THE SEVERAL COURTS OF JUDICATURE

SUBORDINATE TO THE PRESIDENCY OF FORT WILLIAM.

TOGETHER WITH

NOTES ILLUSTRATIVE AND EXPLANATORY,

AND

PRELIMINARY REMARKS.

BY

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IN TWO VOLUMES.

VOL. II.

Calcutta:

PRINTED AT THE BAPTIST MISSION PRESS, CIRCULAR ROAD.

SOLD BY MESSRS. THACKER AND CO. CALCUTTA; AND MESSRS. PARBURY, ALLEN, AND CO. LEADENHALL STREET, LONDON.

1828.

OPINIONS

OF

THE HINDU LAW OFFICERS

ATTACHED TO

THE SEVERAL COURTS OF JUDICATURE

SUBORDINATE TO

THE PRESIDENCY OF FORT WILLIAM,

WITH REFERENCE TO QUESTIONS PROPOUNDED TO THEM

BY

THE JUDGES OF THOSE COURTS.

COMPILED AND ARRANGED

IN ILLUSTRATION OF

THE PRINCIPLES CONTAINED IN THE PRECEDING VOLUME.

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OF THE

SECOND VOLUME.

PRECEDENTS

OF

HINDU LAW.

CHAPTER I.

INHERITANCE.

SECTION I.

Of Sons, Sons' Sons, and Grandsons.

CASE I.

Q. A person instituted a suit against his brother, claiming a superior share of his father's property by right of primogeniture. In this case, is his claim available in law, or otherwise ?

The eldest son is not entitled to a larger share in right of primogeneture.

R. In the *(Cali Yuga)* present age, the specific deduction for the eldest brother is forbidden, as the following text expresses: "In the *Cali* age, a son must not be begotten *on a widow* by the brother *of the deceased husband*, nor must a damsel *once* given away *in marriage* be given a *second time*, nor must a bull be offered in sacrifice, nor must a water-pot be carried *by a student in theology*, nor must a larger portion be deducted for an eldest brother."

Patna Court of Appeal,
March 29th, 1814.
Sheo Bukhsh Sing, *v.* Futtih Singh.

CASE II.

Q. A person had two sons, on whose death a dispute arose between their children about the superior share which was alleged to have appertained of right to the eldest son in virtue of primogeniture. In this case, does the law allow a greater portion to the issue of the eldest son?

And the issue of a younger share equally with the issue of an elder son.

R. A father is at liberty to give his sons greater or less allotments of the wealth acquired by himself; but he is incompetent to do so, if it were property inherited from his own father, and such partition is illegal. According to the doctrines of the *Mitácsharâ* and *Menu,* there is no deduction of the grandfather's property, consisting of lands and other property, for the grandsons, as has been declared: "Among the issue of different fathers, the allotment of shares is according to the fathers."

By this it is understood, that, if one of the brothers had a son, and the other brother had four sons, the half of their paternal estate will devolve on the son of one brother, and the remaining half on the four sons of the other. The best portion of an eldest son is ordained by *Menu,* with reference to the father's self-acquisitions: "Let the eldest have a double share, and the next-born a share and a half, *(if these two clearly surpass the rest in virtue and learning;)* the younger sons must have each a share: *(if all be equal in good qualities, they all must share alike.)* Thus is the law settled."

It is meant, that the first-born is entitled to two shares, the middlemost to a half, and the rest each to a share. Or the eldest shall have a deduction of a twentieth part: "And either dismiss the eldest with the best share; or, if he choose, all may be equal sharers." This law relates to an unequal partition of the father's own acquisitions. *Náreda* forbids an unequal partition after the death of the father: "After the death of the father, let the sons equally divide

his estate." This intends, that after the demise of the father, sons may have equal shares. No unequal partition can be made with the choice of the father contrary to the law.

Náreda says:—"A father has no power, if his intellect be disturbed by sickness, or his mind agitated with wrath, or his affection partially set on the son of a favourite wife, to make a partition different from the law of inheritance."

So *Menu* says:—"Let sons divide equally the effects and the debts, after the death of both parents." How can it be said, because it is propounded by the image of holiness*, that no unequal partition of the patrimony, whether consisting of gold or the like, shall be made by the father, that the grandsons may have an unequal share of the property left by the grandfather? "Over land acquired by the grandfather, over a corrody *out of mines or the like, settled on him or his heirs by the king,* and over slaves employed in his husbandry, (or over gold and the like; *for the* word *dravya* is expounded variously), the father and the son, *when the grandfather dies,* have equal dominion."

According to this doctrine, the father is not at liberty to divide his ancestral estate between his sons according to his own will and pleasure.

Zillah Furruckhabad,
December 19, 1803.

CASE III.

Q. A person died, leaving three sons and a widow, being the mother of all the sons. In this case, has the widow, on partition by the sons, any right over the property left by her husband, which consisted of a house and two shops? If so, what portion will devolve on her?

The heirs being three sons and a widow, (their mo-

R. On the death of the proprietor, his three sons, and his widow, (being the mother of the sons,) are equally en-

* *Yájnyawalcya.*

ther,) each will take a fourth on partition.

titled, on partition, to the inheritance; in other words, each individual of them will take one-fourth of the heritage. This opinion is consonant to the *Mitácshará.*

Zillah Moradabad.

CASE IV.

Q. Three uterine brothers lived in a joint and undivided state. The youngest of them obtained a grant of certain lands in his own name, but his brothers participated equally with him in the enjoyment of the produce. In this case, should all the brothers be considered joint proprietors of the land, or will the person who obtained the grant possess it exclusively? Should all the brothers be dead, the two elder leaving no son, but there being a daughter's son of the eldest, is such grandson in the female line entitled to receive any share of the property, or will the widow of the second brother and son of the person who acquired the grant exclude him, and take the entire estate to themselves?

A. Should the youngest brother have acquired the grant in his own name, by means of his own funds and labour exclusively, in this case, he (the youngest brother) is the sole legal proprietor.

According to the law of Bengal, the heirs of three brothers, being respectively a son, a daughter's son, and a widow, they will each take a third.

If the property have been earned by means of the common funds and labour of all the brethren, though granted in the name of the youngest brother, then the three brothers will be entitled to equal participation. Should all of them be dead, on failure of sons of the two elder brothers, the grandson in the female line of the eldest brother, and the widow of the second and son of the youngest brother will participate the estate equally, it having been acquired by means of common funds and labour. This opinion is conformable to the law, as current in Bengal.

Zillah Tipperah,
June 29th, 1815.

CASE V.

Q. 1. A person had three sons, the eldest of whom, having been separated from his father, lived apart. Afterwards the father died. In this case, are only those sons who lived with him, entitled to succeed him; or have all his sons an equal right of succession?

One of three sons having separated himself from the family, and taken a share during his father's lifetime, has no further claim on the estate.

R. 1. Supposing the father, by mutual free will and consent, to have given some wealth out of his self-acquisitions to his eldest son, and separated him from his family, in this case, on the death of the father, the eldest son has no right to get any additional portion of his father's acquisitions from his brothers.

Authorities.

The texts of *Náreda* and *Vrihaspati* cited in the *Dáyabhága* and *Viváda-chintámani*: "Shares, which have been assigned by a father to his sons, whether equal, greater, or less, should be maintained by them; else they ought to be chastised." "For such as have been separated by their father with equal, greater, or less allotments of wealth, that is a lawful distribution: for the father is lord of all."

Q. 2. If there had been no separation from the father, and the eldest son had left the family on account of a dispute which had taken place between his wife and the other members of the family; in this case, has the eldest son any right to share his father's estate?

R. 2. Supposing the father not to have given any property to his eldest son, or to have made any division of it, and the eldest son to have lived apart, then, on the death of the father, all his sons share the inheritance.

But mere living apart does not exclude.

Authorities.

The text of *Yájnyawalcya,* cited in the *Dáyabhága:* "Let sons divide equally the effects and the debts, after the death of both parents."

Menu: "After the (death of the) father and the mother, the brethren, being assembled, must divide equally the paternal estate; for they have not power over it while their parents live."

Q. 3. Should the eldest son be entitled to inherit from his father, what portion of the self-acquisitions and of the ancestral property will devolve on him?

Sons share equally.

R. 3. On the death of the father, all the sons will equally divide their father's property, whether it consist of self-acquisitions or patrimony.

Authorities.

The text of *Menu.* See Reply 2.

Q. 4. Supposing the eldest son to have left his father, and to have lived apart, and subsequently to such separation, the father to have lived in a joint state with his other sons, who acquired some property while they were living with their father; in this case, how will such acquisitions be distributed among the sons?

Property acquired by exclusive labour, without using the patrimony, goes to the acquirer solely.

R. 4. The eldest brother has no right to the acquisitions of his brethren, provided they were made without the use of the patrimony, even though they were acquired while the sons were living with their father.

Authorities.

The text of *Vyása,* cited in the *Dáyatatwa* and other law books: "What a man gains by his own ability, with-

out relying on the patrimony, he shall not give up to the co-heirs; nor that which is acquired by learning."

Q. 5. Subsequently to the eldest son's departure from the family house, the father, joining his labour to that of his other sons, acquired some property; in this case, will the eldest son share in the acquisition?

R. 5. Whatever property may be ascertained to have been the father's acquisitions made with the assistance of his other sons, his eldest son is entitled to a share in it, because all the sons have a right to inherit from the father*.

But property acquired by a father is on his death inherited equally by all his sons, whether they aided in the acquisitions or not.

Authorities.

The text of *Boudháyana,* laid down in the *Dáyatatwa:* "Male issue of the body being left, the property must go to them."

Zillah Nuddea,
December 3, 1811.

Gowranga Parooe, *v.* Rampersaud Parooe.

CASE VI.

Q. A person had four sons, one of whom died before him, leaving a son; and shortly after his son's death, the original proprietor died. There are now surviving his three sons and a grandson. In this case, is the grandson entitled to inherit from his grandfather?

* But this opinion is defective: the case being a Bengal one, the distinction should have been mentioned. In the *Dáyabhága* it is laid down, that those members of his family who contributed to the acquisitions by their personal labour are entitled to two shares, and that the idle member is entitled to one only; but the distinction does not obtain in other schools, the doctrine in general being, that all the brethren share alike, whenever the patrimony has been expended in making the acquisition, without reference to the degree of personal labour supplied by each.

R. The son's son will equally share with his paternal uncles, though his father died before his grandfather.

A son's son shares equally with sons.

To this effect *Yájnyawalcya* says: "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels."

Catyáyana thus declares: "Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son: and the same *proportionate* share shall be allotted to all the brothers, according to law."

According to the above authorities, if a son die previously to partition, his son is entitled to his father's portion.

Zillah Bareilly,
January 19*th,* 1821.

CASE VII.

Q. A person died leaving seven sons, four of whom, after a lapse of time, were missing, and the remaining three took possession of the paternal estate, confiding the management of it to one of their number. In this case, will the property of the deceased devolve on his three sons and the missing sons' sons?

Sons' sons whose fathers are missing, inherit equally with sons.

R. The deceased proprietor's grandsons, whose fathers are missing, are entitled to share the property with his sons according to their fathers' shares. From the circumstance of the management being confided to one of them, the right of the others cannot be divested. This opinion is conformable to law.

Authorities.

"When the father is dead," &c. (*Dáyabhága,* page 9.)

"Among the issue of different fathers, the allotment of shares is according to the fathers."

"And the dissipation of their hereditary maintenance is censured*."

Zillah Shahabad,
June 20th, 1804.

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* According to the Hindoo law, the term "missing person" implies a civil death, which should be presumed after the expiration of twelve years, (or twenty, according to another authority,) from the date of such person's forsaking the family, supposing that during this interval no intelligence of him has been received. At the end of such period, he is to be considered as dead, and his heirs succeed to his property. According to some authorities, however, the term of twelve years applies to missing persons whose age exceeds fifty years; and for all under that age the term allowed for re-appearance is twenty-four years. According to the *Nirnaya Sindhu*, there are three periods allowed for a missing person: in the first period of life, twenty years; for one of middle age, fifteen; and for one in the latter period of life, twelve years.—Elem. Hindoo Law, App. p. 246. It is not distinctly stated in this case, how long the four sons were absentees. If they were missing longer than the time allowed for re-appearance, then their sons are entitled absolutely to their respective shares; otherwise, they, according to the law as current in Benares, are entitled to a moiety only of their respective fathers' portions; and they are entitled also to the management of the other half, as their proprietary right over the grandfather's estate during the father's lifetime is recognized in the following extract from the *Mitácshará*:—"In such property as was acquired by the paternal grandfather, through acceptance of gifts, or by conquest, or other means, (as commerce, agriculture, or service,) the ownership of father and son is notorious; and therefore partition does take place. For, or because, the right is equal, or alike, therefore partition is not restricted to be made by the father's choice; nor has he a double share." But, according to the law as current in Bengal, they have a right to the management only of their missing fathers' shares, and they cannot compel their uncles to come to a partition of the paternal estate with them, as their right over such property is suspended until their fathers' death.

CASE VIII.

Q. A landed proprietor had two sons. Of these, one died, leaving four sons, of whom two are living, and the other two dead, leaving their sons. In this case, to what proportion of the lands is each entitled?

Grandsons in the male line whose father is dead, and great grandsons whose father and grandfather are dead, share with sons, and inherit *per stirpes*, not *per capita*.

R. Supposing the person in question to have died, leaving some landed property, and two sons, and, of the two sons, one to have died, leaving four sons, of whom two have since died, and the other two are living, then the property left by the original proprietor should be made into two shares, of which one will devolve on his son, and the remaining one will be subdivided into four parts, of which two will go to the two surviving grandsons, and the other two portions to the heirs of the two deceased grandsons. If, of the deceased grandsons, one had many sons, and the other had less in number, they will, in that case, take their fathers respective shares, and divide them, according to the numbers of the brothers, among themselves. This opinion is conformable to the *Dáyabhága*, *Dáyacramasangraha*, and *Mitácshará*.

Authorities.

" Among the issue of different fathers, the allotment of shares is according to the fathers." The purport of the text, however, is this: If there be a numerous issue of one brother, and few sons of another, then the allotment of shares is according to the fathers. If there be one son living, and sons of another son (who is deceased), then one share appertains to the surviving son; and the other share goes to the grandsons, however numerous. For their interest in the wealth is founded on their relation by birth to their own father; and they have a right to just so much as he would have been entitled to. Accordingly, a great-grandson, whose father (as well as grandfather) is deceased, is in like manner an equal claimant with the son and grandsons; for he likewise presents a funeral oblation." This is laid down in the *Dáya-bhága*, and is conformable to the *Dáyacramasangraha*.

"If unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four; the two receive a single share in right of their father, the other three take one share appertaining to their father; the remaining four similarly obtain one share due to their father. So, if some of the sons be living, and some have died leaving male issue, the same method should be observed; the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text."—*Mitácshará*

Calcutta Court of Appeal.

CASE IX.

Q. The grandfather of the plaintiff had nine sons, A, B, C, D, E, F, G, H, and I, who on his death took possession of his estate. Three of them, A, B, and C, died leaving no male issue. Afterwards one of the surviving brothers, D, died, leaving a widow, who succeeded to her husband's share, and, according to the decrees passed by the *zillah* and provincial courts*, the property left by the first deceased three brothers, namely, A, B, and C, was divided by the surviving five brothers, E, F, G, H, and I. The plaintiff now pleads, that, according to law, on the death of the widows of A, B, and C, their legal shares of the property should have devolved by right of succession on his (the plaintiff's) father and uncle, E and F alone, as they were living at the time when the widows above mentioned died, as the other three brothers did not survive them, and as their heirs, consequently, could have no right to inherit the property left by A, B, and C. In this case, what is the law as current in Bengal in this respect?

* The decrees here alluded to must have proceeded on a mistaken apprehension of the provisions of the Hindu law, which (as it is current in Bengal) prefers the widow to the brother in all cases.

The right of representation descends lineally only, and does not extend collaterally.

R. On the death of C, leaving no heir down to a mother, his property real and personal should have devolved on his brothers of the whole blood, A and B, on whose death, in default of heirs down to the great grandson, their property, which they inherited both from their father and brothers, should have devolved in equal portions on their respective widows. At their (the widows') death, leaving no heir, down to their husbands' uterine brothers, the property which they inherited from their husband should have devolved on their husbands' brothers of the half blood, E and F; as their husbands' other three half brothers, G, H, and I, died before them, and as consequently their sons could have no claim of inheritance. On the death of E and F, their sons will inherit, but not the sons of G, H, and I. This opinion is consonant to the *Dáyabhága, Dáyatatwa, Dáyacramasangraha,* and other authorities current in Bengal.

Authorities.

The following texts are cited in the works above alluded to.

Yájnyawalcya:—" The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates."

Catyáyana:—" Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Devala:—" Next let brothers of the whole blood divide the heritage of him who leaves no male issue." " If there be no uterine or whole brother, the half brothers of the same class with the deceased are entitled to the succession."—*Dáyacramasangraha.*

Devala :—"When the father is deceased, let the sons divide the father's wealth."

Sudder Dewanny Adawlut,
July 16*th*, 1814.

CASE X.

Q. A person had two wives, and by each of them a son. In the year 1202 Fuslee, a dispute arose between the two sons, and the father having reserved something out of his ancestral real property, (the lands of which were undivided, and formed his sole means of subsistence,) put the remainder into his sons' possession in equal portions: the engagement, however, for the payment of revenue, receipts, and other documents relative to the management of the property, continued to be executed in the father's name. From the year above specified, the son by the senior wife lived apart from his brother. After the father had made this disposition of the property between his two sons, a son was produced by his junior wife, in consequence of which he (the father) executed a document duly attested, in modification of his former disposition, to the effect that all the three sons, having equally shared the ancestral landed estate, should severally possess their respective portions. Consequently the third son, who is a minor, petitioned the court against his half and whole brother, to compel the delivery to himself of his own share. In this case, will the paternal immoveable property be equally shared and possessed by all the three brothers, or otherwise?

A minor son is not entitled to claim possession of his share of the joint property, which is in the hands of his brothers.

R. The action instituted by the brother who is under age (not having completed the age of sixteen) against his brothers of the half and whole blood for a third share of the patrimonial real estate, is not admissible, as *Sancha* says:—"Partition is allowed when the minor heirs attain the age of majority. A male ends his nonage at the expiration of sixteen years."

Yájnyawalcya:—"If the father make a partition among his sons, he may give at his pleasure, *more to some, and less to another*, and may give the first born the portion of an eldest son, or divide the estate among all of them in equal shares." *Menu*:—"Shares, which have been assigned by a father to his sons, whether equal, or greater, or less, should be maintained by them: else they ought to be chastised*. Under these circumstances, when the minor shall attain the age of sixteen, he will be entitled to claim one third of the paternal immoveable estate, in virtue of the disposition subsequently made by the father, and to obtain possession of his share from his brothers of the whole and half blood; but not before †.

Zillah Sarun, *November 29th*, 1808.

CASE XI.

Q. The eldest brother of a *Súdra* family, which consisted of four brothers and a sister, had one son by a female

* This is not a text of *Menu*, but of *Vrihaspati*. See *Dáyabhága*, page 50.

† From the tenour of the above opinion, it might be supposed that no partition can be made while there is a minor coparcener living, or until such minor shall attain the age of majority. But if a person die, leaving adult and minor heirs, it does not necessarily follow that his property shall not be divided among his heirs until the minor attain to majority; for if those who are of age are desirous of coming to a partition of their patrimony, the partition may be made during the minority of the brother. On the other hand, if those who are of age dissipate, or otherwise dispose of the entire joint property for the purpose of defrauding the infant who by law is incapable of managing his own affairs, in this case also the minor is competent to sue for partition through his guardian. The brethren may in such case be compelled to deliver the minor's share to his guardian, or to the ruling power in whose custody his share shall remain, until he attain the age of majority; but under no circumstances can a minor be entrusted with the management of his property before he comes of age; and the doctrine here maintained appears to go no further, than that a minor is not competent of himself to sue for possession of his share of the joint property.

slave; and the sister, during her husband's absence, and while he was residing in a foreign country, had a son by a stranger. The other three brothers died, leaving no heir. Now there are two persons, namely, the son of the eldest brother, and the son of the sister, living, and each claims the property. In this case, on which of these survivors will the property left by the brothers devolve?

R. Under the circumstances above stated, in default of all heirs down to the daughter's son, the family being of the *Sūdra* tribe, the entire property will devolve on the son begotten by the elder brother on a female slave. The son of the sister has no title to the inheritance.

The son of a *Sūdra* by a female slave will inherit, if there be no other heirs down to a daughter's son.

The text of *Yájnyawalcya* cited in the *Mitácshará*:—"Even a son begotten by a *Sūdra* on a female slave, may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share: and one who has no brothers may inherit the whole property, in default of a daughter's son*."

Zillah Hooghly,
March 3*d*, 1816.

Bukhtear Singh, *versus* Buhadoor Singh and others.

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* According to the Hindoo law, the illegitimate son of a *Sūdra* man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes. It appears in this case that the parties are *Sūdras;* but it is not distinctly stated whether the eldest brother died previously or subsequently to the death of any or all of his other three brothers, or whether the woman on whom the plaintiff was begotten by him was one of the fifteen descriptions of slaves, or was merely a concubine. If the woman were his slave, and the other three brothers died before the eldest, then the son begotten by him on the female slave would be entitled to the entire property. On the other hand, if one or more of the brothers died subsequently to the death of the eldest brother, the illegitimate son would be entitled to claim only such portion as belonged to his putative father, there being no law admitting the son of a *Sūdra* by a female slave to share the estate of collaterals. If

CASE XII.

Q. A person having assigned a moiety of his self-acquired landed estate to his sons by one wife, separated himself from them, and with the other half continued to live in a state of union with his son by another wife. On the death of the father, are the sons entitled to an equal portion of the estate left by him?

Sons legally separated from their father have not, on his death, any claim to inherit with a son not separated.

R. Under the circumstances stated, the disposition of the estate made by the father will hold good, if not made through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favourite wife, in either of which cases each of his sons would be entitled to an equal share of the estate; otherwise, on his death, the sons who were separated from him during his lifetime have no claim to the inheritance.

Zillah Junglemehals,
January 19*th*, 1820.

CASE XIII.

Q. If in any particular country it should have been the ancient usage to make a distribution of property with a greater share to the eldest born, in right of primogeniture, is such usage to be upheld, notwithstanding the general prohibition against the right of primogeniture in the *Cali Yuga*, or present age? An answer to this question is required to be delivered according to the law of Behar.

R. Notwithstanding the general prohibition against the right of primogeniture in the *Cali Yuga*, or present age,

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the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance; and under no circumstances could the son of the sister begotten as above have any right to succeed to his mother's brothers.

if it has been the ancient and immemorial usage in any particular country to divide immoveable or other property, allotting a greater share in favour of the first born, such ancient usage, so sanctioned by the consent of the inhabitants, must be upheld. This opinion is delivered in conformity to the *Vivâda Tândava, Veeramitrodaya, Vyavahâra Mayûc'ha, Raja Mârtanda,* and other authorities current in Behar.

Authorities.

Authority for the above opinion.

1st. The usages declared peculiar to provinces, tribes, and families, must be upheld; otherwise the people are distressed. The southern Brahmins intermarry with their maternal cousins. In the western provinces, artizans and others, who profess the Hindu religion, eat the flesh of kine. To the eastward, Hindus eat fish, and their women commit adultery. In the northern countries, the Hindu females drink spirituous liquors, and the men approach them while in a state of impurity. Text of *Vrihaspati* cited in the *Vivâda Tândava, Veeramitrodaya, Vyavahâra Mayûc'ha,* and other authorities.

Ditto.

2d. The usage of a country must be established from the commencement, and that which is established must be upheld in the country. Wise men learned in the law do not practise in opposition to popular will. Therefore the popular practice must be followed. Text of the *Raja Mârtanda.*

Sudder Dewanny Adawlut,
September 24th, 1814.

Sheobuksh Singh, appellant, *versus* Futtih Singh, respondent.

SECTION II.

OF WIDOWS.



CASE I.

Q. A childless Brahmin dies, leaving his mother and a widow, him surviving. According to the law of inheritance, to which of these survivors does his property real and personal belong? What is the rule of succession, in case of the mother and widow's living together in a joint state, and what is the rule if they are divided?

A widow succeeds to her husband's property, to the exclusion of his mother.

R. On failure of a son, grandson, and great-grandson, the widow has the proprietary right to her husband's estate; and this is the rule, whether the mother lives jointly or separately. She cannot in any case have a right to the succession while there is her son's widow. This opinion is conformable to law.

Zillah Chittagong,
May 22d, 1817.

CASE II.

Q. A person dies, leaving a widow and a brother of the whole blood. According to law, does his property appertain to his widow, or should it devolve on the brother, he furnishing the widow of his deceased brother with maintenance?

In Bengal, a widow excludes a brother.

R. On failure of heirs down to the great-grandson, the widow, according to the law of Bengal, is entitled to enjoy her husband's property during her life, whether consisting of lands or other property, and the brother has no right of succession while she survives.

Authorities.

Vrihaspati: "Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brother, be present."

Vrihat Menu: "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."

Yájnyawalcya: "The wife and the daughters, also both parents, brothers likewise," &c.

Vishnu: "The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters, &c. This opinion is delivered according to the doctrine of the *Dáyabhága*," &c*.

Dacca Court of Appeal,
August 19th, 1819.

CASE III.

Q. A person died, leaving a widow and a brother of the half blood. Subsequently to his death, the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with his religion; in this case, which of the two is entitled to succeed to the property of the de-

* The above opinion was delivered conformably to the doctrine current in Bengal. In Benares and elsewhere, the widow would not have been entitled to succeed, and the brother would have been the heir, if the family was united. But according to all the doctrines of Hindu law, it is agreed, that the widow has not unlimited power over her husband's estate. She has only a life interest. She cannot sell or otherwise alienate it, except for special purposes; and on her death, it devolves on the husband's brothers or other heirs. See Case 12, and cases of gift and sale, *passim*.

ceased? Supposing the widow during the lifetime of her husband to have cohabited with a stranger, and to have therefore been expelled from the family, and to have lost her reputation, has such widow any right to inherit her husband's property?

An unchaste widow forfeits all right to her late husband's property.

R. It is the general doctrine, that the virtuous widow of a man who dies leaving no heir down to the great-grandson, succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession: consequently the widow in such case would be excluded by her husband's half brother. So in the case of her having acted unchastely while her husband was living. The authorities for this opinion are laid down in the *Dáyabhága* and other books of law.

Authorities.

Vrihaspati: "If her husband die before her, she shares his wealth. This is a primeval law*."

Catyáyana: "Let the widow succeed to her husband's wealth, provided she be chaste." "The childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled; and so indeed should those who are perverse†."

Vrihat Menu: "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."

Náreda: "But a wife, who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of the property before described."

Zillah Hooghly.

* *Dáyabhága*, 159. † *Mitácshará*, 363.

CASE IV.

Q. There were two brothers, of whom one died, leaving sons, who are still alive; and the other died leaving a son, who also died, leaving a widow, him surviving. The widow had become a prostitute, and had violated her husband's bed. In this case, is she entitled to inherit her husband's estate, and if not, on whom does his property devolve?

R. If it be proved that the widow in fact did not keep her husband's bed unsullied, she has no title to his property, and ought to be expelled from his house. His estate, in default of heirs down to the uncle, should devolve on his uncle's sons. This opinion is in conformity to the authority contained in the *Dáyabhága*, &c.

And may be expelled from his house.

Zillah 24-Pergunnahs,
July 18*th*, 1811.

CASE V.

Q. Raja Bhuwa-bul Deo died leaving four sons, namely, Baboo Iswari-buksh Deo, Baboo Dilgunjun Deo, Baboo Ahlad Singh, and Baboo Soobhnath Singh, of whom the eldest (Baboo Iswari-buksh Deo) died, leaving a minor son and two widows, the elder called Ranee Sheoraj Koonwur, and the younger Ranee Ahbeeman Koonwur, and subsequently the minor died. Ahlad Singh died, leaving Hurucnath and Jynath as his sons and representatives; lastly, Dilgunjun Deo died childless, leaving a widow called Ranee Goolab Koonwuree; and Soobhnath is still living. In this case, whether will the property left by Dilgunjun Deo, devolve on his widow Goolab Koonwuree, on his brother Soobhnath, or on his brother's sons Hurucnath and Jynath?

R. Supposing Dilgunjun to have left neither son, son's son, nor son's grandson at his death, but to have been survived by his widow Goolab Koonwuree, his brother Soobhnath Singh, and his brother's two sons Hurucnath and Jy-

According to the Hindu law as current in Benares, the widow will succeed to the

exclusion of the brother, if the estate was divided; but if undivided, the brother will exclude her; and the brother in either case excludes the brothers' sons.

nath, his widow is alone entitled to succeed to his real and personal estate, provided it be divided. If Bhuwa-bul Deo died leaving four sons, Iswari-buksh, Dilgunjun, Ahlad, and Soobhnath, and his estate was undivided, then the uterine brother Soobhnath is entitled to inherit the portion to which his late brother Dilgunjun was entitled, whose widow has a right to demand food and raiment only until her death. This opinion is conformable to the *Mitácshará* and other law tracts which are current in the western provinces.

Authorities.

"The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates."—*Yájnyawalcya,* cited in the *Mitácshará.*

"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brother's sons."—*Vishnu,* cited in the same authority.

"The rule, deduced from the texts (of *Yájnyawalcya,* &c.), that the wife shall take the estate, regards the widow of a separated brother."—*Mitácshará.*

Menu: "To the nearest kinsman (*Sapinda*), the inheritance next belongs."

Sudder Dewanny Adawlut, *May* 10*th,* 1824.

Baboo Hurperkash Singh, *v.* Baboo Dilgunjun Deo.

CASE VI.

Q. A person died possessed of an ancestral landed estate and other property, leaving three sons, who, subsequently to their father's death, jointly and undividedly en-

joyed the estate. One of them died a short time after, leaving a widow and a daughter while the estate was held in joint tenancy, and on his death his widow obtained his share of the moveable property, and at present she claims one-third of the landed estate. In this case, is she entitled to take her husband's portion of the undivided ancestral immoveable property, or not?

According to the law as current in Benares, the widow of an undivided brother has no right to her husband's property.

R. Under the circumstances above stated, the widow is not entitled to any portion of the undivided ancestral landed estate.

Authorities.

Boudháyana, after premising, "A woman is entitled," &c. proceeds, "not to the heritage, for females, and persons deficient in an organ of sense and member, are deemed incompetent to inherit."

Náreda: "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord."

Zillah Sarun,
March 2d, 1807.

CASE VII.

Q. 1. A person died leaving his father, brother, widow, daughter, and daughter's son; in this case, in what proportions will these persons respectively be entitled to share the property which the deceased acquired?

Distribution of joint property, the claimants being a father, brother, widow, daugh-

R. 1. Supposing the deceased to have acquired the property without the use of his father's funds, and to have left his widow, daughter, daughter's son, father, and brother him surviving, his acquisitions should be made into four

ter, and daughter's son.

shares, two of which go to the father, and the remaining two to the widow. *Catyáyana* says: "A father takes either a double share, or a moiety, of his son's acquisition of wealth." "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." If the acquisition was made with the aid of the paternal property, and the acquirer be survived by the individuals above mentioned, the father would take a moiety of the goods acquired by his son, the acquirer's widow two shares, and his brother one share.

Circumstances under which a widow excludes a brother.

Q. 2. A person living in a state of union with his two brothers, acquired some property moveable and immoveable, with or without the use of the patrimony, and with the sanction of his father divided his own acquisitions and the paternal estate with his brothers. The partition was formally entered into, and documents were drawn out by each of the brothers. The brother alluded to, died before his father; and then the father died. In this case, will the brother's widow, daughter, and daughter's son take his property exclusively, or will his surviving brothers be entitled to any part of it?

R. 2. Under the circumstances stated, the widow is alone entitled to succeed her husband.

Q. 3. Supposing the brother alluded to, without the consent of his father, to have joined with his brothers in making a division of the patrimony and their respective acquisitions, to have made the division by executing formal deeds of partition, and to have died before his father, who made objections to the validity of those deeds; in this case, to which of those individuals, being his widow, daughter, daughter's son, and brothers (the father being dead), will his property go?

R. 3. Under the circumstances stated, the brothers are entitled to that portion of the property which may be ascertained to be the ancestral estate; and of any property which may be proved to be the deceased's personal acquisitions made with the use of the father's funds, the brothers first take one moiety by right of their deceased father, and out of the remaining half, the acquirer's widow will take two shares, and the other brothers one each. If the property have been acquired exclusively by the deceased brother, without any detriment to the patrimony, then, on the death of the father, the brothers must have a moiety of the acquisitions as their father's share, and the acquirer's widow the residue.

Distribution between a widow and her husband's brothers, the husband having died in the lifetime of his father.

Q. 4. Is a daughter, during her mother's lifetime, competent to sue her uncle for her father's property, by virtue of her right of succession?

R. 4. A daughter is not competent to bring an action against her paternal uncle, founded on her right of inheritance to her father's property, while her mother exists.

A daughter cannot claim succession while her mother lives.

Q. 5. A widow brought an action, claiming her late husband's property, against his brothers, and afterwards executed a release, by relinquishing not only her own right and title, but that of the deceased's daughter and daughter's son, in favour of the brothers. In this case, is the daughter at liberty to bring an action against her mother and uncles for the share of the joint property which belonged to her deceased father?

R. 5. Supposing the widow to have sued her husband's brothers for his legal share, and to have entered into a release, with an intention to defeat the right of her daughter and daughter's son, the daughter is competent to sue her mother and uncles to annul the transaction. It is pro-

Unless the mother do some act tending to defeat her right.

hibited by law to the widow to make an alienation of any property, excepting her own peculiar property, while the heirs exist.

By such an alienation the hereditary means of maintenance would be destroyed: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and dissipation of their hereditary maintenance is censured."

Zillah Hooghly,
July 8th, 1815.

CASE VIII.

A woman has no claim to her missing husband's share of his father's property.

Q. 1. A person, ten years before his father's death, forsook his family and resided in another country, and no intelligence has been received regarding him since his departure. Is his wife, immediately on the death of his father, entitled to institute a suit for her husband's share of the patrimony against his two brothers of the half blood?

R. 1. The wife of the missing person has no right to claim her husband's share of the patrimony, but she must be provided by his brothers with food and raiment*.

Q. 2. What is the time fixed by law, at the expiration of which a missing person is to be considered as dead?

The time allowed for the re-appearance of a missing person is 12 years, after which his death is to be presumed.

R. 2. Should a person have proceeded to a foreign country, and no intelligence of him have been received for the space of twelve years, he is, at the end of that period, to be considered as dead, and his exequial ceremonies should be performed by his representatives. Should they not then perform such ceremonies, they act sinfully†.

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* This is not the law of Bengal.

† But see note to Case 7. of Sons, &c. page 9.

Menu says: "And their childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled; and as, indeed, should those who are perverse*."

City Patna,
August 28, 1804.

CASE IX.

Q. A person had a family by two wives, namely, by the first wife a son, and by the second two sons. These three brothers continued to live together as a joint and undivided family; and some time after, one of them, being the issue of the first wife, proceeded to a foreign country, and no intelligence concerning him has been received for the period of fifty-five years, during which time his wife lived under the protection of his brothers, who managed the estate as before. Now the wife of the missing person claims the share of her husband. In this case, is she entitled to her husband's legal share, or only to her proper maintenance?

The wife of a person who has been missing for fifty-five years has no right to claim his share of the joint property, according to the law of Benares.

R. Supposing the wife of the missing person to have lived with her husband's brothers as a joint and undivided family for the period of fifty-five years, her claim is inadmissible and illegal, according to the law of Benares.

Authorities.

Boudháyana, after premising, "A woman is entitled, &c." proceeds, "not to the heritage; for females, and persons deficient in an organ of sense, or member, are deemed incompetent to inherit."

It should not be argued, that the wife of a missing person, regarding whom intelligence has not been received for fifty-five years, has any right to her husband's share of the joint ancestral landed property.

* *Yájnyawalcya.* Vide *Mitácshará,* page 329.

Náreda says: "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord."

Zillah Sarun.

Q. How would the law in this case be in Bengal?

But has a right according to the law of Bengal.

R. According to the law as current in Bengal, the widow would be entitled to her husband's share.

CASE X.

Q. An individual had two sons, A and B. The eldest (A) died before his father, leaving a son and a widow. Subsequently the father died, leaving a family consisting of B and his wife, and A's son and widow; and at his death he also left some landed property. Some time after this, the son (B) died, leaving his widow, and his brother's son and widow him surviving. In this case, what proportions of the property of B will respectively devolve on the eldest son's son and widow, and on the younger son's widow?

The claimants being a brother's son and a widow, the former will take the property, if the family was joint; but the latter if separate, according to the law of Benares.

R. If A's son, his widow, and the widow of B, lived together as a joint family at the time when B died; according to law, A's son is alone entitled to the estate, but it is necessary for him to provide B's widow with food and raiment equal to her condition of life. If they formerly lived apart, and the share of B was separated, then his widow is entitled to the property which fell to her husband's legal share. A's widow has no right of succession, but she must be provided by her son with proper maintenance.

Zillah Moradabad.

Doorgapersaud, *v.* Khuma and another.

CASE XI.

Q. Of three landed proprietors, two died, each leaving a widow, and the third died leaving two sons, him surviving. The widows and the two sons of the last deceased jointly possessed the ancestral landed estate. Subsequently the widow of the eldest brother died; then the eldest son of the third brother, leaving a widow and his brother, who subsequently died unmarried. Lastly, the widow of the second brother died. There are now surviving only the widow of the third brother's son, and a descendant in the fifth degree of her husband's paternal line. Under these circumstances, according to law, which of these two survivors is entitled to the landed estate?

A widow cannot inherit property left by her husband's relatives or their widows.

R. Under the circumstances above stated, the surviving widow has no title to inherit from her *Sapindas,* or the persons who partake of undivided oblations.

Authorities laid down in the *Dáyabhága. Boudháyana,* after premising, " A woman is entitled, &c." proceeds, " not to the heritage; for females, and persons deficient in an organ of sense, or member, are deemed incompetent to inherit." By the mention of " not to the heritage" is understood, that a woman is declared incompetent to succeed her *Sapindas* and the like. The *Sapinda* of the fifth degree is entitled to the succession. To this effect is the text of *Menu* contained in the *Dáyabhága:* " To the nearest kinsman *(Sapinda,)* the inheritance next belongs." *Cullūcabhatta* thus comments on the above passage: " Of the *Sapindas,* whosoever becomes nearest is entitled to the inheritance. The term *Sapinda* extends to the seventh person, *or the sixth degree of ascent or descent.* So also the text of *Menu* cited in the same authority: Now the relation of the *Sapindas,* or men connected by the funeral cake, ceases with the seventh person, *or in the sixth degree of ascent or descent;* and that of *Samano-*

dacas, or those connected by an equal oblation of water, ends only when their births and family names are no longer known."

The *Sapindas* are entitled to the succession of their *Sapindas* by reason of conferring benefits on them by presenting oblations to their manes, but not their wives. This is conformable to the *Dáyabhága, Dáyatatwa, Cramasangraha,* and other authorities*.

Zillah Mymunsigh.

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* Although the widow of the third brother's son is entirely excluded from inheriting the property left by his uncle's widow, yet of the estate enjoyed by the three brothers she is entitled to one-third.

On the death of two of the proprietors, their widows were their sole heirs, and they were entitled to take two shares out of three, or one share each in right of their respective husbands.

On the death of the other brother, his heirs being two sons, his share should have been made into two parts, of which each of his sons was entitled to one.

On the death of the widow of the eldest brother, her property, that is, one share which she inherited from her husband, should have been made into two parts, of which her husband's brother's sons were each entitled to one.

On the death of the eldest son of the third brother, his property should have been inherited by his widow, to the entire exclusion of the others.

On the death of the other son of the third brother, his property should have devolved exclusively on his nearest *Sapinda,* who by law becomes his legal heir; and on the death of the widow of the second brother, her property should also have devolved on her nearest *Sapinda,* a female having no title to inherit from her *Sapindas.*

Consequently, supposing neither of the surviving individuals to have received any share, the property should be made into six parts: of which the widow of the third brother's son will take in right of her husband two shares, one of which he inherited from his father, and the other from the widow of his paternal uncle, the eldest son of his grandfather; and the *Sapinda,* or the fifth in degree of the paternal line, will take the remaining four, that is to say, two which he inherited from the second brother's widow, and the other two from the second son of the third brother.

CASE XII.

Q. A childless widow instituted an action against some individuals, being her husband's heirs, claiming the sum of 300 rupees, as her right of maintenance. It appears that the plaintiff's husband died leaving two widows, namely, the plaintiff and another, the mother of three sons. In this case, is the claiming widow entitled to any share of her husband's estate, or to maintenance only out of the property?

A widow is entitled to maintenance from her step-sons.

R. A childless widow is entitled to receive only food and raiment out of her husband's estate, where there is a son surviving, and she is not entitled to participate in the wealth.

Zillah Chittagong,
August 5th, 1817.

CASE XIII.

Q. A person who had two sons, divided his whole property, consisting of assessed and rent-free lands and household goods, between them in equal portions, reserving nothing for himself; and at the same time it was conditioned, that for the remainder of his life he should reside for six months in the house of the elder son, and be supported by him, and for the other six months in that of the younger son, alternately. At the time when the partition was made, the father had no ready money; but, subsequently, some money was acquired by the elder son, with which a mercantile concern was carried on by the younger son, who had then acquired no property. The elder son died, leaving a widow and daughter; afterwards the father died before his younger son and his elder son's widow and daughter. At the death of the elder son, his widow came into the possession of her husband's share which he received at the partition; but on the death of the younger son, his widow ousted the widow of the elder son from her husband's share. In this case, to what proportion is the widow of the elder son entitled?

Case in which the widows of two brothers inherit equal shares of property.

R. Of the two brothers who received the property at the partition made by the father, supposing the elder to have acquired some property, and to have died before his father and widow, in this case, his widow is entitled to the whole of that which her husband took on the partition ; and her husband's *acquisitions* should be made into four parts, to two of which she is entitled, and the widow of the younger son has a right to the remainder.

" The wife," &c. Vide *Dáyabhága,* page 160*.
Zillah Hooghly.

CASE XIV.

Q. 1. A Hindu acquires landed property by means of his own funds, or by means other than those of the joint funds, at a time when he is living in partnership with his brethren. Do such lands after his death go to his undivided brethren, or to his widow ? If they go to his widow

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* This is doubtless an accurate exposition of the Hindu law, provided the property divided had been acquired by the father ; otherwise, had the property been ancestral, and had his wife been living, and capable of bearing children, the partition would have been illegal, and the widow of the elder son would have had no right to the property which fell to her husband's share at the partition made by the father ; for it is a settled rule of law, that when a father makes a partition of his patrimony between his sons, he is bound to reserve the double share of a son ; otherwise the partition should not be considered as lawful. But of any property that may have been acquired by the personal exertions and labour of the elder son, unaided by the father's or brother's funds or labour, a moiety should be taken by his widow, and the other half by the widow of the younger son, in right of her father-in-law, to whose share her husband was entitled to succeed. On the other hand, if the property have been acquired with the aid of the father and brother, and the family be undivided, such acquisitions should be made into six shares, of which one-third should go to the widow of the acquirer (the elder son), and the remaining two-thirds to the widow of the younger son, the father being entitled to one half, and the acquirer to a double share of such acquisitions.

has she or has she not a right to dispose of them by sale or gift; and, if she has not a right to dispose of such lands by sale or gift, to whom will they devolve after the death of the widow? To her husband's heirs, or to whom?

R. 1. A Hindu acquires landed property by means of his own funds, or by means other than those of the joint funds, at a time when he is living in partnership with his brethren. Under these circumstances, such lands are not divisible among his brethren. After his death, therefore, the right to them will be vested in his widow, and not in his undivided brethren. But in such case, the widow has no right, without the consent of her husband's heirs, to dispose of the lands so devolved upon her from her husband by sale or gift, and after the death of the widow, the right to such landed property will be vested in the heirs of her husband. This opinion is delivered in conformity to the *Vivádachintámani*, the *Vivádaratnácara*, the *Vyavahárachintámani*, and other authorities current in Tirhoot.

Property acquired without using the patrimony by one brother living in partnership, belongs to him exclusively.

After his death, it goes to his widow, who has, however, no right to dispose of it; and after her death, it devolves on his brethren.

Authorities.

1st. What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent; for it was gained by his own exertion. Texts of *Menu* and *Vishnu* cited in the *Vivádachintámani*, *Vivádaratnácara*, and other authorities.

Authority for the first part of the opinion.

2d. That which is acquired without detriment to the joint stock, belongs exclusively to the acquirer. Interpretation of the text in the *Vivádachintámani*.

Ditto.

3d. Property acquired without detriment to the joint stock is indivisible. Interpretation of the *Vivádaratnácara*.

Ditto.

Authority for the second part of the opinion.

4th. As by no text is a woman authorized to dispose of, by gift or sale, immoveable property given to her by her husband; in like manner she has no authority to dispose of, by gift or sale, her husband's immoveable property which she has inherited. *Vivádachintámani.* So also the *Prakásh* and *Ratnácara.*

Ditto.

5th. When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. Text of *Náreda* cited in the *Vivádaratnácara,* and other authorities.

Ditto.

6th. A gift, pledge, or sale of lands, houses, or slaves, by a dependant person, is invalid or inefficient. Text of *Catyáyana* cited in the *Vyavahárachintámani.*

Ditto.

7th. Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it.

Q. 2. If a Hindu, in the presence of his undivided brethren, made over to his wife his own share in the joint ancestral property, and the lands acquired by him in the mode described in the preceding question, as her *Stridhun* or peculiar property, will such lands after his death go to his widow as her *Stridhun,* or will they devolve on his undivided brethren; and, if they go to the widow of the proprietor, has she, or has she not a right to dispose of them by sale or gift: and, if she has not a right to dispose of them by sale or gift, to whom will they belong after her death? To her husband's heirs, or to whom? An answer to these questions is required to be delivered according to the law of Tirhoot.

R. 2. If a Hindu, as stated in the second question, in the presence of his undivided brethren, made over to his wife his own share in the joint ancestral property, and the lands acquired by him in the mode described in the preceding question, as her *Stridhun* or peculiar property, without any opposition or objection being made on the part of his brothers, from which their assent is inferrible, then under such circumstances, after his death, the right to his property will be vested in his widow, and not in his undivided brethren. In which case, his widow is not at liberty to dispose of the lands in question by sale or gift, no more than she is entitled to dispose of other immoveable property given to her by her husband, which forms her *Stridhun* or peculiar property: and, after the death of the widow, (should she leave no son, nor daughter, nor grandson, nor grand-daughter,) her sister's son, or the son of her husband's brother, or of his sister, or of her own brother, or her son-in-law, or her husband's younger brother, will successively inherit such immoveable property given to her by her husband, which is in the predicament of her *Stridhun* or peculiar property. In default of all those above mentioned, the property will go to the nearest *Sapinda* of her husband. This opinion is delivered in conformity to the *Vivádachintámani, Vivádaratnácara,* and other authorities current in Tirhoot.

That which is given by a husband to his wife, is termed her *Stridhun*, or peculiar property.

But if such property given to her by her *husband* be *immoveable*, she has no right to dispose of it. On her death it goes to her heirs, in preference to the heirs of her husband.

Authorities.

1st. That which is received from affectionate kindred, or earned by valour, or given to a woman by her relations with the consent of her husband, is a valid acquisition. Text of *Vrihaspati,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Authority for the first part of the opinion.

2d. A person may dispose of his own acquisitions as he pleases. Text of *Vrihaspati,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Ditto.

Authority for the first part of the opinion.

3d. That which is received by a married woman or maiden, in the house of her husband or of her father, from her husband, or from her parents, is termed the gift of affectionate kindred. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and sale, according to their pleasure, even in the case of immoveables. Text of *Catyáyana*, cited in the *Vivádachintámani*, *Vivádaratnácara*, and other authorities.

Authority for the second part of the opinion.

4th. The power of women having been declared generally over property given by affectionate kindred, an exception is here propounded in the case of immoveable property given to her by her husband. Interpretation of the text in the *Vivádaratnácara*.

Ditto.

5th. What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property. Text of *Náreda* cited in the *Vivádachintámani*, *Vivádaratnácara*, and other authorities.

Ditto.

6th. A woman's property goes to her children, and the daughter is a sharer with them. Text of *Vrihaspati*, cited in the *Vivádachintámani*, *Vivádaratnácara*, and other authorities.

Ditto.

7th. Daughters share the residue of their mother's property, after payment of her debts, and the male issue succeed in their default. Text of *Yájnyawalcya*, cited in the *Vivádachintámani*, *Vivádaratnácara*, and other authorities.

Ditto.

8th. Male issue includes the grandson, and great grandson in the female line. Interpretation of the text in the *Vivádachintámani*.

9th. The mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property. Text of *Vrihaspati*, cited in the *Vivádaratnácara*, and other authorities.

Authority for the second part of the opinion.

10th. Where there are many kinsmen, cognates, and relations, the first in order takes the estate of one dying and leaving no male issue. Text of *Vrihaspati*, cited in the *Vivádarátnácara*.

Ditto.

Sudder Dewanny Adawlut, 1*st December*, 1814.

Sheonarain Singh, appellant, *versus* Jhudda Singh, respondent.

CASE XV.

Q. A Hindu inhabitant of Patna died, leaving three wives him surviving. Of these three, the first was childless; the second had three daughters, and the third had one daughter. Under these circumstances, on the death of the childless wife, to whom does her share of the property legally belong, and who is entitled to claim it, according to the law as prevalent in that part of the country?

R. If a Hindu inhabitant of Patna die, leaving three wives; the first childless, the second having three daughters, and the third one daughter, of whom the childless one died, in this case, the surviving two widows of her husband are entitled by law to her share of the property, and to sue for the same; because, although a widow succeeds to her husband's property in default of male issue, yet, on her death, it goes to her husband's nearest heirs, and in this instance his nearest heirs, in default of son, grandson, and great-grandson, are his widows. This is the law accord-

A man dying and leaving three widows, who inherited his property, on the death of one of them without issue, the two others will take her share.

ing to the *Mitácsharà*, *Veeramitrodaya*, *Vyavahára-mayúc'ha*, *Vyavahárakoustúbha*, and other authorities current in Patna, and the adjacent places.

Authorities.

The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it."—*Catyáyana.*

The wealth of him who leaves no male issue, goes to his wife; on failure of her to his daughter, &c.—*Vishnu.*

A wife, daughters*, &c.—*Yájnyawalcya.*

Sudder Dewanny Adawlut,
July 12*th*, 1827.

Doonda Singh, appellant. Musst, *v*. Doorga Koonwur.

* The case stated is that of a widow dying childless, and being survived by two other widows of her husband, each of whom had issue; but it would have been the same had the deceased widow been the mother of a daughter or daughters; the property going at her death to the nearest heirs of her husband, who are in this instance his wives and not his daughters. But all the daughters would inherit equally on the death of all the three widows.

SECTION III.

OF DAUGHTERS, THEIR SONS, &c.



CASE I.

Q. A landed proprietor dies, leaving two married daughters, and one unmarried. Of the two married daughters, one files a plaint in a court of justice, claiming a third of the estate left by her father. In this case, who is entitled to the succession? Can a married daughter sue for partition, where there is a maiden daughter living?

A maiden excludes all married daughters.

R. Of the daughters, the maiden one is, in the first place, heir to the paternal property, by reason of her offering the funeral oblations to the deceased father, to the entire exclusion of all the others.

Authorities.

The text of *Menu,* laid down in the *Suddhitatwa* and other law books: "The maiden daughter of a person who dies leaving no male issue, offers the funeral cake to his manes*."

Accordingly, where there are married and unmarried daughters, the maiden exclude the married daughters from the inheritance. To this effect the *Dáyabhága* cites the text of *Parasara:* "Let a maiden daughter take the heritage of one who dies leaving no male issue; or, if there be no such daughter, a married one shall inherit." *Menu:* "His

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* This is not a text of *Menu*, but of *Rhishyasringa*.

own maiden daughter, born in holy wedlock, shall like a son, take the inheritance of him who dies without male issue*."

First, the maiden daughter takes the inheritance, then the daughter who has been betrothed, and lastly the married daughter: this is the rule of the daughters' succession. The claim, therefore, of the married daughter is inadmissible.

City of Dacca,
January 8th, 1817.

CASE II.

Q. A person died, leaving a widow and two daughters, one married, and the other a maiden. Subsequently to his death, the widow disposed of her maiden daughter in marriage, and brought the bridegroom to her own house, where he resided with her family until her death, and managed her property. The widow having executed a deed of gift, in which she assigned her husband's whole property to her son-in-law, who lived with her, gave the donee possession of the gift, and then died. The son-in-law performed her funeral rites, and he was deprived of his share of his own paternal estate by reason of his living in the house of his father-in-law. The original proprietor's married daughter now claims the half of the paternal estate, that is, a moiety of the gift. In this case, was the widow competent to make a gift of her husband's property to her second daughter's husband, though her other daughter was living?

Married daughters succeed to equal portions of an estate which had devolved

R. If a person, being destitute of male issue, and living apart from his brothers, die, leaving two daughters and a widow; in the first instance, the widow succeeds, and on her death the daughters are equally entitled to the inheri-

* This is not a text of *Menu,* but of *Devala.*

tance; consequently, while the proprietor's two daughters are living, the widow cannot give her husband's whole immoveable property to her second daughter's husband without the sanction of her eldest daughter, but she might have made a donation of the moveable property. The gift of the immoveable estate made by the widow is illegal. On her death, her two daughters will equally share their paternal landed estate. This opinion is conformable to the *Mitácshará* and *Vyavahará Mayúc'ha.*

on their mother at the death of their father, by reason of there being no male issue.

Authorities.

Yájnyawalcya:—"The wife and the daughters*," &c.

Vrihat Vishnu:—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters."

Catyáyana:—"Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, the daughter inherits."

Vrihaspati:—"Let the wife of a deceased man, who left no male issue, take his share. The wife is pronounced successor to the wealth of her husband; and in her default, the daughter. As a son, so does a daughter of a man, proceed from his several limbs. How then should any other person take her father's wealth?"

"The daughters share the residue of their mother's property, after payment of her debts†."

"By favour of the father, clothes and ornaments are used, but immoveable property may not be consumed, even with the father's indulgence."

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* *Dáyabhága,* page 160. † *Yájnyawalcya.* See *Mit.* p. 266.

"The father is master of the gems, pearls, and corals, and of all (other moveable property): but neither the father nor the grandfather is so of the whole immoveable estate."

"Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons."

"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should therefore be made."

"To the lineal descendants, when they appear, of that man, whom the neighbours and old inhabitants know by tradition to be the proprietor, the land must be surrendered by his kinsman."

"Separated kinsmen, as those who are unseparated, are equal in respect of immoveables: for one has not power over the whole, to give, mortgage, or sell it."

Bareilly Court of Appeal,
May 18*th*, 1820.

CASE III.

Q. A person died, leaving a son and a daughter by different wives. The son is insane and dumb, and there is no hope of his recovery. In this case, is the daughter alone entitled to succeed to her father's property, or does it devolve on his maternal grandfather, subject to the condition of his maintaining the son?

There being a son and daughter by different mothers, and the son being in-

R. Under the circumstances stated, in default of his widow, the daughter of the deceased is alone entitled to the succession, to the exclusion of the son. The son's maternal grandfather has no legal claim to any share of

the property subject to the condition stated, but the son must be supplied with the necessaries of life by his half-sister.

sane and dumb, the daughter is alone entitled to the succession.

Authorities.

Menu:—"Impotent persons and outcasts, persons born blind and deaf, madmen, ideots, the dumb, and those who have lost a sense or a limb, are excluded from a share of the heritage."

Devala:—"On the death of a father or other owner of property, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an ideot, nor one born blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his heritage. For such men, except those degraded, let food and clothes be provided."

Zillah Burdwan,
July 25th, 1822.

CASE IV.

Q. A man of the *Sudra* tribe had a son and a daughter. The son died during the lifetime of his father, leaving a widow. Afterwards the father died, leaving a daughter, who is mother of male issue, and his son's widow. According to law, is the widow entitled to inherit the property, or the daughter of the deceased proprietor?

A. If the man died leaving no widow, his daughter (who is mother of male issue) is entitled to inherit his entire property, although there is a widow of his son; the widow having no right to her father-in-law's property where his own daughter exists, because the daughter may cause her sons to present the funeral cake to her father, and also to two of his ancestors, but the widow of his son is not competent to fulfil this duty.

A daughter excludes a son's widow.

Authorities.

"The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow student: on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven, leaving no male issue." "Even the son of a daughter delivers him in the next world, like the son of a son." These doctrines are laid down in the *Dáyabhága* and other works.

City Dacca,
March 27th, 1815.

CASE V.

Q. If a person die, having two daughters, and subsequently one of them die, leaving two sons and her sister, her surviving; in this case, will the property of the deceased daughter devolve on her sons, or on her sister? What is the law in respect of such property, whether it be divided or undivided?

Of two daughters who succeeded jointly to the paternal property, one dying leaving sons, her share goes to her sister, provided that sister have or be likely to have a son: otherwise the son of the deceased daughter inherits.

R. Supposing the person to have died leaving two daughters, and subsequently one of them to have died having two sons and a sister, her surviving; and the deceased daughter to have succeeded to the property at the time when she was a maiden, or to have succeeded after her marriage, and afterwards her sister to have become a barren or childless widow, then the deceased daughter's share of the paternal estate will devolve on her sons. If the deceased daughter derived the right to the property after her marriage, and her sister be not a barren or a childless widow, then that sister, she having male issue, or being likely to have such, is entitled to the succession. The property which devolved on the married daughter by right of inheritance, goes at her death to her father's next heir. Of the father's heirs, in default of an heir down to the widow, his daughter is first in rank.

The property, whether it be divided or undivided, and whether after partition the family be reunited or not reunited, will, according to the law as current in Bengal, devolve on the next heir. This opinion is conformable to the *Dáyabhága,* commentary of *Sricrishna Tarcálancára* on the *Dáyabhaga, Dáyacramasangraha, Vivádárnavasetu, Vivádabhangárnava,* and other authorities current in Bengal.

Authorities.

" In default of the wife, the daughter next succeeds." " The following special rule must be here observed, namely, that if a maiden daughter, in whom the succession has once vested, and who has subsequently married, should die without having borne issue, the married sister who has, and the sister who is likely to have, male issue, inherit together the estate which had so vested in her. It does not become the property of her husband or others, for their right is exclusively to a woman's separate property, *(stridhun.)* But, if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession; and on failure of either of them, the other takes the heritage. In default of daughters having, and daughters likely to have, male issue, daughters who are barren, or widows destitute of male issue, are incompetent to take the inheritance, because they cannot benefit the deceased owner, by offering (through the medium of sons) the funeral oblation at solemn obsequies. In default of all daughters (who are entitled to succeed), the daughter's son takes the inheritance." This is laid down in the *Dáyacramasangraha, Vivádárnavasetu,* and other authorities.

" In like manner, if the succession have devolved on a daughter, those persons who would have been heirs of her father's property, in her default, (as her son, her paternal

grandfather, &c.) take the succession on her death; not the heirs to the daughters' property (as her daughter's son," &c.) This is cited in the *Dáyabhága.*

Sudder Dewanny Adawlut.

CASE VI.

Q. The proprietor of an ancestral landed estate died, leaving a widow and a daughter him surviving. Subsequently to his death, his widow took possession of the property by right of inheritance, and then she died, leaving the daughter before mentioned, who was a childless widow, and a son of her husband's paternal uncle. Now these two survivors claim the inheritance; in this case, which of them is entitled to it, or are they both, and if so, in what proportions?

Property which had devolved on a widow at her husband's death, goes, when she dies, to the son of her husband's paternal uncle, to the exclusion of her childless widowed daughter.

R. Under the circumstances above stated, according to law, the succession devolves on the son of the paternal uncle, by whom the childless widowed daughter is excluded; but she is entitled to receive food and raiment from the son of the paternal uncle of the proprietor. This opinion is conformable to the *Dáyabhága* and other works of law.

Dacca Court of Appeal, February 6th, 1808.

CASE VII.

Q. There were four brothers of the whole blood, who jointly held a paternal landed estate. Two of them are still living, and the other two died, one leaving two sons, and the other a maiden daughter. In this case, is the daughter entitled to any share of the property, and if so, what proportion will devolve on her?

According to the law of Benares, a man's daughter, the family being joint, is only

R. Supposing the maiden daughter to have no other near relation living, except her uncles, and uncles' sons, then they (her uncles, and uncles' sons) are bound to dispose of her in marriage. If the daughter's deceased father

have not separated his portion of the paternal estate from that of his coparceners, then they are bound to supply the necessary expenses attendant on her marriage, out of the produce of the joint estate. The daughter cannot inherit the legal share of her deceased father. This opinion is consonant to the law, as propounded by *Yájnyawalcya, Vishnu*, and other sages*.

entitled to maintenance from her uncles and their sons, who succeed to her exclusion.

Zillah Alligurh,
June 2d, 1819.

CASE VIII.

Q. 1. A man died, leaving a widow (A), and a daughter (B), who had two sons (C and D), of whom the former died before his mother, leaving a widow, but no issue. In this case, has the widow of C, either during the lifetime of B, or on her death, any right to the property left by the original proprietor? Or on the death of B, will the property devolve on D, or on his heirs, while C's widow is living?

R. 1. At the death of the original proprietor, who left no heir down to a great-grandson, his widow was entitled to his property; and at her death, her daughter, B, had the right of inheritance, her son's (C's) widow having no right of succession; as her husband's property over his maternal grandfather's property could not have accrued during the lifetime of his mother; but on the death of B, her son, D, is entitled to inherit the whole property of his maternal

The claimants being a daughter or daughter's son, and the widow of a daughter's son, the latter will be excluded, and the two first will inherit, in succession.

* According to the law, as received in the school of Benares, the undivided brother's female heirs are excluded by his male coparceners, as will appear from the subjoined extracts from the *Mitácshará*:—"The wife shall take the estate, regards the widow of a separated brother." Page 337. "Therefore it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue." Page 340. But according to the law as prevalent in Bengal, the union of the family is no bar to the succession of the female heir.

grandfather; and on his death, his heirs will take it, to the exclusion of C's widow. This opinion is conformable to the *Dáyabhága*, *Vivádabhangárnava*, and other authorities.

Authorities.

The texts of *Yájnyawalcya* and *Vishnu*: "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student," &c. &c. "The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters."

Q. 2. On the death of the original proprietor, his widow made a gift of his entire property to her two grandsons C and D, while their mother, that is, the daughter (B) was living. In this case is the gift binding and good?

R. 2. Supposing the widow, during the lifetime of her daughter B, to have made a gift of the whole property of her husband which devolved on her at his death by law of inheritance, without the express consent of her daughter, to her two grandsons, the gift is illegal, as it is a settled rule, that the widow has only the right to enjoy her husband's property with moderation until her death. This is consonant to the doctrines cited in the *Dáyabhága* and other law tracts.

Authorities.

Catyáyana: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

"Thus in the *Mahabhárata*, in the chapter entitled *Dánadharma*, it is said: "For women, the heritage of

their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."

Zillah Nuddea,
March 8th, 1823. }

C'shamuncuree Dossea, *v.* Anundchunder Goopta.

CASE IX.

Q. Is a daughter's son entitled to inherit the estate of his maternal grandfather, while a childless widowed daughter of that ancestor exists?

A daughter's son excludes a daughter, being a childless widow.

R. The daughter's son is alone entitled to succeed his maternal grandfather, even though his daughter who is a childless widow is living, she being excluded by reason of her having neither husband nor issue.

Authorities.

The text of *Vrihaspati,* cited in the *Dáyabhága* and other legal authorities: " As the ownership of her father's wealth devolves on her, although kindred exists; so her son likewise is acknowledged to be heir to his maternal grandfather's estate."

Menu : " The maternal grandfather becomes in law the father of a son: let that son give the funeral cake, and possess the inheritance*."

The true meaning of the preceding passage is, " that in default of daughters having, and daughters likely to have male issue, daughters who are barren, or widows destitute of male issue, are incompetent to take the inheritance, because they cannot benefit the deceased owner by offering

* Last stanza, *Menu,* IX. 136.

(through the medium of sons) the funeral oblation at solemn obsequies."

Zillah Hooghly,
July 1st, 1822.

CASE X.

Q. Three individuals (being uterine brothers) live together, enjoying their patrimonial property as an undivided family. The elder brother dies, leaving a wife and daughter him surviving. The second brother dies, leaving a son. The younger brother dies also, leaving a wife and son. On the death of the elder brother, his widow continued to live with her husband's second and younger brothers, exclusively enjoying her portion of the property. She subsequently died, leaving her daughter, and that daughter's son. Afterwards the daughter died, leaving her son. In this case, does the estate of the elder brother devolve on his daughter's son, or on his nephews—in other words, the sons of his second and younger brothers?

A daughter's son excludes brother's sons.

A. Under these circumstances, the estate of the eldest brother will be inherited by his daughter's son, and not by his second and younger brother's sons. This opinion is conformable to law*.

Zillah Tipperah,
June 27th, 1815.

* This exposition of the law is correct, as far as regards the doctrine of the Bengal school. It would have been different, had the question occurred elsewhere; see case 7. See also the case of Jugmohun Mookerjea and another, *versus* Punchanund and another, Sudder Dewanny Adawlut Reports, vol. iv. p. 67, in which the estate of a Hindu was awarded to the sons of his daughters, in preference to the grandsons by lineal descent in the male line of his full brother.

CASE XI.

Q. A man dying, and leaving a brother's widow and son, and a daughter's son, (the whole family being joint and undivided,) have the two former any right to participate in the property of the deceased, notwithstanding the existence of the latter, he being in a state of minority?

A daughter's son excludes a brother's widow and his son.

R. On failure of heirs down to the daughters, the grandson of the deceased in the female line is alone entitled to the succession, to the entire exclusion of the brother's widow and son, even though they lived with the minor as a joint and united family. The estate to which the minor is entitled by inheritance will be managed by his nearest of kin during his minority.

Authorities.

" The wife and the daughters, also both parents, brothers likewise." The term daughters implies both the daughters and their sons.

Dacca Court of Appeal, August 20th, 1819.

CASE XII.

Q. A person had two sons by different wives. His younger son died, leaving a widow, both parents, and his half brother (who was older than himself) him surviving; subsequently to his death, the father died; and the eldest son took possession of all the moveable and immoveable property which he left. Some time afterwards, this son died, leaving his step-mother, a daughter's son, and the widow of his half brother. The widow of the brother who died last became possessed of all the property which had devolved on her husband, and soon after died, leaving two claimants to the estate; namely, her own grandson in the female line, and the widow of the first deceased (being the

On the death of a widow, the property held by her goes to her husband's daughter's son, to the exclusion of her hus-

band's brother's widow, but the latter is entitled to maintenance.

younger son) still living. In this case, according to law, does the estate devolve on the daughter's son of the eldest son, or on the widow of the younger one?

R. In default of heirs down to daughters having, and daughters likely to have male issue, the daughter's son is entitled to the succession. The widow whose husband died during the lifetime of his father, has no right to take the inheritance on the death of her husband's half brother's widow, but her maintenance rests with the grandson of the eldest son.

Zillah Burdwan,
August 19th, 1823.

CASE XIII.

Where the family is separated, the daughter's son takes the estate, to the exclusion of the uncle and uncle's son.

Q. A person of the *Kayustha* or *Cait* class, was survived by his three sons A, B, and C, who took possession of their father's estate, consisting of thirty-seven *beegahs* and ten *biswas* of land; subsequently the eldest son (A) died, leaving a son who was in the enjoyment of his father's share; and then the second son (B) died, leaving a son. The third son (C) is still living. The son of the eldest son died, leaving a daughter, and her two sons. These two grandsons claim one-third of the estate, being their maternal grandfather's legal share, but their mother is still living. Under these circumstances, supposing the eldest brother's son to have enjoyed the property without having come to any division of it with his two uncles, on the death of such eldest brother's son, will his property devolve on his uncle C, on his other uncle's (B's) son, or on his own daughter, or on his daughter's sons whose mother still survives? Supposing the property to have been divided, and that they lived apart, in this case, should that portion which the eldest brother's son possessed, devolve on his daughter or daughter's sons, or on any, and what other person? and generally, whether the eldest brother's son lived together or apart

from his uncles, and died leaving the individuals above specified, what is the law as to their respective rights of succession?

R. The order of the heirs of a separated and not reunited individual is thus laid down by *Yájnyawalcya:* "The wife and the daughters, also both parents, brothers, &c. This rule extends to all persons and classes*."

The estate of a person deceased, who was separated from his coparceners, and not reunited with them, first goes to his widow; in default of her, to the daughter, as *Catyáyana* says: "Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, let the daughter inherit, if unmarried."

So *Vrihaspati:* "The wife is pronounced successor to the wealth of her husband; and, in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth." On that subject *Menu* says: "The son of a man is even as himself; and the daughter is equal to the son: how then can any other inherit his property, notwithstanding the survival of her, who is as it were himself."

By the import of the particle "also," the daughter's son succeeds to the estate, on failure of daughters. "If a man leave neither son, nor son's son, nor wife, nor (female) issue, the daughter's son shall take his wealth. For, in regard to the obsequies of ancestors, daughters' sons are considered as sons' sons."

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* It would have been *vice versâ* according to the law of Benares, had the family been joint and undivided.

"By that male child, whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son: let that son give the funeral oblation, and possess the inheritance."

On failure of these heirs, the mother* takes the inheritance; in default of her, the father is successor; the uterine

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* According to the doctrine of *Jimútavahana* and others, whose works are current in Bengal, the mother's right of succession is admitted after the father. *Jimútavahana* says, that "in the term *pitarau*," both parents, (contained in the text of *Yájnyawalcya*, vide *Dáyabhága*, page 160,) "the priority of the father is indicated: for the father is first suggested by the radical term *pitri;* and afterwards the mother is inferred from the dual number, by assuming, that one term (of two which composed the phrase) is retained." But the followers of the schools of Benares and Mithila give the mother the preference over the father, as will more clearly appear from the subjoined extract containing the doctrine on this subject of the *Mitácshará*, with Mr. Colebrooke's remarks. "Therefore, since the mother is the nearest of the two parents, it is most fit that she should take the estate. But, on failure of her, the father is successor to the property." "The commentator, *Balambhatta*, is of opinion, that the father should inherit first, and afterwards the mother; upon the analogy of more distant kindred, where the paternal line has invariably the preference before the maternal kindred; and upon the authority of several passages of law, *Nandapandita*, author of commentaries on the *Mitácshará*, and on the institutes of *Vishnu*, had before maintained the same opinion. But the elder commentator of the *Mitácshará*, *Vishweshwarabhatta*, has in this instance followed the text of his author in his own treatise entitled *Madanapárijata*, and has supported *Vijnyaneswara's* argument, both there and in his commentary named *Subodhini*. Much diversity of opinion does indeed prevail on this question. *Sricara* maintains, that the father and mother inherit together: and the great majority of writers of eminence (as *Apararca* and *Kamalacara*, and the authors of the *Smritichandricá*, *Madanaratna*, *Vyavahára Mayúc'ha*, &c.) gives the father the preference before the mother. *Jimútavahana* and *Raghunandana* have adopted this doctrine. But *Váchaspatimisra*, on the contrary, concurs with the *Mitácshará* in placing the mother before the father; being guided by an erroneous reading of the text of *Vishnu*, as is

brother takes the heritage at the father's death; in default of a brother of the whole blood, the half brother becomes heir.

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remarked in the *Veeramitrodaya*. The author of the latter work proposes to reconcile these contradictions by a personal distinction. If the mother be individually more venerable than the father, she inherits; if she be less so, the father takes the inheritance."

The following is an extract from the *Vivádabhangárnava*: "More arguments might be brought to prove the preeminence of the mother; for example, her importance declared in an authoritative text: "A mother surpasses a thousand fathers, for she bears and nourishes the child in the womb; therefore is a mother most venerable."

"If the veneration due to her exceed the respect due to a father a thousand fold, how can the text cited from the *Purana* by *Mádhavácharjya* be relevant?"

"By law, the father and the mother are two reverend parents of a man in this world; however adorable *the goddess of* the earth, a mother is *still* more venerable. But, of these two, the father is preeminent, because the seed is chiefly considered; on failure of him, the mother is *most revered;* after her, the eldest brother."

"He himself thus reconciles the seeming contradiction: this relates to a father, *who gives instruction to his son in the whole Veda*, after performing the ceremonies on conception, and all other holy rites which perfect the twice-born man: otherwise the mother is most venerable. Accordingly, the text of *Menu* is also pertinent."

Menu: "A mere *achárjya*, or a teacher of the *gayatri only*, surpasses ten *upadhyas;* a father, a hundred such *achárjyas;* and a mother a thousand natural fathers."

Vyása: "Ten months a mother bore her infant in her womb, suffering extreme anguish; fainting with travail and various pangs, she brought forth her child; loving her sons more than her life, the tender mother is *justly* revered; who could recite all her merits, even though he spoke a hundred years?"

"By citing other texts from the *Purános*, the volume would be unnecessarily swelled; for this reason they are omitted. The seeming difficulty is thus reconciled: Title to respect is no cause of inheritance; were it so, who could take the estate, while both parents exist? But benefits conferred by his own act, and near relation by the funeral cake, *are the grounds on which rests the claim of an heir*. Now the father is superior by the benefits which he confers: therefore he has the right of succession, even though the mother be living."

But although a great majority of writers gives the father the preference over the mother, yet according to the law as current in Benares and Mithila, the mother has the superior claim of inheritance.

Menu: " Of a son dying childless, *and leaving no widow,* the *father* and mother shall take the estate: and the mother also being dead, the paternal *grandfather* and grandmother shall take the heritage, *on failure of brothers and nephews.*"

To the nearest kinsman *(sapinda)* the inheritance next belongs.

Among the *sapindas,* he who is nearest is entitled to succession, and he who is remote is excluded by the nearest: such is the meaning of the text.

Accordingly, *Vrihaspati* says: " Where many claim the inheritance of a childless man, either paternal or maternal, of more distant kinsmen, he who is the nearest shall take the estate."

According to the preceding passages of *Menu, Vishnu, Vrihaspati, Catyáyana,* and *Yájnyawalcya,* it is determined, that supposing the eldest brother's son to have separated from his uncles, and not to have been reunited, his estate will go first to his daughter, and, in default of her, his grandsons in the female line will take the inheritance; but, if the property was held in joint tenancy, or if he, after separation, became reunited with his paternal relations, then his property would devolve on his uncle and uncle's son, because they are his *sagotras* and *sapindas.*

This opinion is conformable to the *Mitácshará* and *Vyavahára Mayúc'ha.*

Bareilly Court of Appeal.

CASE XIV.

Q. A *Brahmin* died, leaving two sons, a daughter, and a daughter's son. Subsequently his eldest son died without

male issue, and then the younger, leaving a widow and a daughter, who are since deceased; but the latter at her death left an unmarried daughter and her own husband, who is the defendant in this case. Now the original proprietor's grandson by the female side claims the property which devolved on the younger brother's daughter. In this case, will the property in question devolve on the original proprietor's daughter's son, or on the husband of the younger brother's daughter?

R. Under the circumstances stated, the property which the younger son's daughter inherited from her father will go to the original proprietor's daughter's son, to the entire exclusion of her husband and daughter, because the grandson confers more benefit on the deceased. Any property which is her own *peculium*, her own heirs will take. This is consonant to the *Dáyabhága*.

Ancestral property inherited by a daughter will at her death go to her father's relations, to the exclusion of her husband and daughter.

Zillah Hooghly,
February 28th, 1817.

CASE XV.

Q. A person brought an action, claiming his maternal grandfather's property, while his mother was living, and there was a possibility of her bearing more children. In this case, was the grandson entitled to a judgment for the property?

R. The plaintiff's mother has exclusive right to the property claimed; consequently the plaintiff cannot be considered in the light of an heir to the deceased, so long as his mother survives.

A man cannot claim his maternal grandfather's property, while his mother is living.

Zillah 24-Pergunnahs.

CASE XVI.

Q. A landed proprietor died, leaving two widows and two daughters by different wives. Some time after the

widows died, and on their death the first wife's daughter who is a childless widow, and the second wife's daughter who is mother of two sons, jointly possessed the estate, and equally shared the produce of it. The daughter who is a childless widow, disposed of a moiety of the estate by a deed of gift in favour of her own spiritual teacher *(gooroo)*, for the benefit of her deceased father. In this case, has the deed of gift validity or otherwise?

A childless widowed daughter is excluded by a daughter who has male issue.

R. Under the circumstances stated, the childless widowed daughter has no right to any part of the paternal estate, even though she enjoyed the moiety of its produce; consequently, the gift, which was made without the sanction of her half-sister and her sons, is illegal. This is conformable to the *Dáyabhága* and other legal authorities.

Authorities.

" Therefore the doctrine should be respected, which *Dicshita* maintains; namely, that a daughter, who is mother of male issue, or who is likely to become so, is competent to inherit; not one who is a widow, or is barren, or fails in bringing male issue, as bearing none but daughters, or from some other cause." The *Dáyabhága.*

" The doctrine maintained by *Dicshita,* and respected by the author of the *Dáyabhága,* namely, that in default of daughters having, and daughters likely to have male issue, daughters who are barren, or widows destitute of male issue, are incompetent to take the inheritance, because they cannot benefit the deceased owner by offering (through the medium of sons) the funeral oblation at solemn obsequies, should be understood." The *Dáyacramasangraha.*

Calcutta Court of Appeal.

SECTION IV.

OF PARENTS, &c.

CASE I.

Q. A minor dies, leaving his mother and four paternal uncles him surviving, and some property, which was joint and unseparated from that of his uncles. In this case, of these individuals, on whom does his share of the undivided estate devolve? If, according to law, the mother has a life interest in it, is she entitled to obtain the value of a wall of his dwelling house, usurped by one of her husband's brothers?

In Bengal, a mother inherits joint property, to the exclusion of a paternal uncle.

R. Supposing the minor to die, leaving no heirs down to the father, his mother will take the entire estate, whether consisting of moveables or immoveables; and where there is a mother living, the paternal uncles have no title to the inheritance. The uncle who has taken possession of the wall, which was in common, is to pay the value of the deceased's portion thereof to the mother, as she is the sole heir of her son.

Authorities.

Yájnyawalcya says: "The wife and the daughters, also both parents," &c.

Vrihaspati says: "Of a deceased son, who leaves neither wife nor male issue, the mother must be considered as heir: or by her consent, the brother may inherit."

Zillah Nuddea.

Unnapoorna Dibia, *versus* Ramjya Mookherjya.

CASE II.

Q. 1. A person had three sons by his two wives. On the death of the second son, who was unmarried, the father divided his real and personal property between his surviving sons in equal portions. The two brothers separated from each other during the father's lifetime, and enjoyed their respective shares of the property. Shortly after, the eldest son died, leaving a widow and two sons, one of whom did not long survive. At the death of the original proprietor, he left his second son, and his eldest son's widow and son, him surviving. The widow of the eldest son, together with her son, took possession of his share; and lastly her son, (that is, the grandson of the original proprietor,) died, and after his death also the widow continued in possession for some time of the share which had belonged to her husband; but now the younger son of the original proprietor is desirous of ousting the widow of the eldest son, and they are contesting about the property. Supposing the fact of the adjustment of the shares, and the partition of the property to have been made as specified, in this case, how will the estate of the original proprietor be distributed among the parties, that is, the younger son of the proprietor, and his eldest son's widow?

And divided property universally.

R. 1. If it be proved that the original proprietor made the partition of his estate as specified, then his younger son and his grandson's mother, (the widow of his eldest son,) are respectively entitled to the portions which he assigned to his sons.

Q. 2. Supposing the original proprietor to have had three sons by two wives, the second son to have died unmarried before his father, the eldest son to have died also before his father, leaving a widow and two sons, (one of whom subsequently died,) and then the original proprietor, without having

made any division of his property, to have died before his younger son, and his eldest son's widow and son (who is since dead;) in this case, of the survivors, that is, the younger son of the original proprietor, and his eldest son's widow, which is entitled to inherit his property; and if both, to what proportion is each of them entitled?

R. 2. On the death of the original proprietor, his son and grandson were entitled to inherit in equal portions, and on the death of such grandson, leaving no heir down to the father, the mother is successor; consequently the property left by the original proprietor will devolve both on his younger son and his eldest son's widow in equal shares.

In succession to her son, who shared his grandfather's estate equally with his uncle.

Calcutta Court of Appeal,
July 22d, 1805.

Deveepershad Chatoorjya, *v.* Sava Dasee Dibia.

CASE III.

Q. After the death of Rutunmala, first widow of Kishenkishore, and of Nundkishore, the son adopted by her, without issue, who was heir to the two anna share left by them? Was it the appellant, Narainee Dibia, second widow of Kishenkishore? or Ramkishore, the son adopted by her, if he be really so? or the heirs of Kishengopal Rai, full brother of Kishenkishore? or the heirs of Gunganarain and Lukhinarain, half brothers of Kishenkishore? and does the case turn at all on the legality or illegality of the adoption of Ramkishore by the appellant, Narainee Dibia?

The following is a sketch of the family.

SRIKISHEN,

Zemindar of *pergunnah* Mymunsingh, &c. left four sons, the first and second by one wife, the third and fourth by another.

1st.	2d.	3d.	4th.
KISHENKISHORE *zemindar* of 4 annas in dispute, died in 1171, without issue, leaving two widows, viz. 1. Rutunmala, who died in 1191, after adopting Nundkishore; 2. Narainee Dibia (the plaintiff), who states that she adopted Ramkishore after Nundkishore's death.	KISHENGOPAL had no issue, but adopted Joogulkishore, the father of Hurkishore (the defendant).	GUNGANARAEN.	LUKHINARAEN left two sons, viz. Shamchunder and Rooderchunder.

A step-mother has no right of succession according to the law of Bengal, and the property of her step-son will rather go to his uncle's adopted son.

R. If after the death of Rutunmala, first widow of Kishenkishore, her adopted son Nundkishore, adopted under due authority from her husband, died without issue, Nundkishore's two annas go to the adopted son of Kishengopal, full brother of Kishenkishore, (that is, to the cousin-german by adoption;) not to the second widow of Kishenkishore, (step-mother by adoption); nor to the heirs of Gunganarain and Lukhinarain, (half brothers of the adopting father.) If however, the adoption of Ramkishore by Narainee Dibia (the appellant) be a good adoption, then Ramkishore is heir to the two annas of Nundkishore. In the *Shasters,* there is no express prohibition, or sanction, of two adoptions: if it be the usage in Bengal to make two adoptions, the adoption of Ramkishore is no doubt valid: and he succeeds to the two annas, as before stated. The reason why the step-mother of Nundkishore, that is, Narainee, the appellant, cannot succeed to his share, is, that in the *Dáyabhága,* and other authorities current in Bengal, wherever the word *mata,* or mother, occurs, it is explained to intend *jananee,* or actual mother. These books do not authorize

the step-mother's succession. But she should receive a maintenance from the person who takes the inheritance. In the books of the Dekhun, viz. the *Mitácshará,* &c. the word *mata* implies both mother and step-mother: according to these, the step-mother would share.

Authorities.

Menu: "The son begotten by a man himself *in lawful wedlock,* the son of his wife begotten *in the manner before* mentioned, a son given *to him,* a son made *or adopted,* a son of concealed birth, *or whose real father cannot be known,* and a son rejected *by his natural parents,* are the six kinsmen and heirs." "Of the man to whom a son has been given, *according to a subsequent law,* adorned with every virtue, that son shall take *a fifth or sixth part of* the heritage, though brought from a different family."

Baudháyana: "Participation of wealth belongs to the son begotten by a man himself *in lawful wedlock,* the son of his appointed daughter, the son begotten on his wife *by a kinsman* legally *appointed,* a son given, a son made *by adoption,* a son of concealed birth, and a son rejected *by his natural parents.*"

Gotama: "The son begotten by a man himself *in lawful wedlock,* the son of a wife *begotten by an appointed kinsman,* a son given, a son made by adoption, a son of concealed birth, and one rejected by his natural parents, are sons who inherit property."—*Yájnyawalcya.*"

Menu: "Of a son dying childless, (and leaving no widow,) the mother shall take the estate; and, the mother also being dead, the father's mother shall take the heritage."

The term "mother" mentioned in the texts (above alluded to) intends 'natural mother,' for the terms "mother,"

grandmother, and great-grandmother, &c. (in such texts as the following) bear their original sense of 'his own natural mother,' 'father's natural mother,' and 'grandfather's natural mother;' and it is by those terms that they are decribed as taking their places at the funeral repast. But the introduction of step-mothers and the rest to a place at the periodical obsequies, is expressly forbidden. Thus the sage declares, "Whosoever dies, whether man or woman, without male issue, for such person shall be performed funeral rites peculiar to the individual, but no periodical obsequies." The *Dáyabhága**.

Narainee Dibia, *v.* Hurkishore Rai.
Sudder Dewanny Adawlut, December 24th, 1801.

CASE IV.

Q. A minor dies, leaving his sister, his paternal uncles, and his father's mother. In this case, according to law, which of these individuals is entitled to succeed him by right of inheritance?

A paternal grandmother excludes a sister and uncles.

R. His paternal grandmother is exclusively entitled to the succession. The sister and the uncles are excluded by her.

To this effect is the text of *Menu* cited in the *Dáyabhága* and other authorities: "Of a son dying childless (and leaving no widow), the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage †."

* It is not by any means clear, that in other places than Bengal a step-mother has the right to succeed to property. Indeed, although this might be inferred from the opinion of the Pundits above given, the reverse may be assumed as the fact. See note to S. D. A. Reports, vol. i. p. 42. At a partition, she would, according to the law of Benares, come in for a share.

† This is agreeable to the law of Bengal, according to the order adopted by *Sricrishna* in the *Dáyacramasangraha*, which is universally

CASE IV.

Q. A *Brahmin* died, leaving a widow and two sons. In this case, is the widow entitled to any share of the property left by her deceased husband: if so, to what portion? She having disposed of her share to one of the sons while there were two widows of the other son living, has the gift validity or otherwise?

A mother is entitled to a share equal to that of one of her sons, and she may give that share to her only son. See note.

R. Under the circumstances above mentioned, the widow is entitled to one-third of her husband's property. If she, having succeeded thereto, bestowed her share on one son, while the other son's two widows were alive, the gift must be considered good and valid*.

Dacca Court of Appeal, September 8th, 1805.

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admitted to be the most eminent authority in that province; but according to his commentary on the *Dáyabhága*, the paternal uncle is stated to have a preferable claim to that of the paternal grandmother.

* It is not distinctly mentioned in this case, whether the widow was the mother of both those sons, or of one only, or was childless. If she was mother of both sons, and did not receive any fortune as her separate property from her husband or father-in-law, she is entitled to a share equal to that of one of her sons; but if separate property had been bestowed on her, she is entitled to a moiety only, as is expressed by *Jimútavahana:* "When partition is made by brethren of the whole blood, after the demise of the father, an equal share must be given to the mother. The equal partition of the mother with the brethren takes effect, if no separate property had been given to the woman. But if any have been given, she has half (a share)." If she had only one son, or was childless, she had no right of succession; for in the former case, her only son would provide her with the necessaries of life, and in the latter she would be entitled only to maintenance out of her husband's property, as is declared by *Sricrishna Tarcálancara,* in his work called the *Dáyacramasangraha:* "The step-mother does not participate, but she must be maintained with food and raiment." The mother, moreover, has no power to compel her sons to surrender her a share, if they intend to live together as an undivided and united family; for there is no provision in the *Dáya-bhága* or other legal authority, that partition of the paternal estate can be made by the choice of a mother, as it takes place by the will of any one of the co-heirs.

SECTION V.

OF BROTHERS, THEIR SONS, &c.

CASE I.

Q. 1. A person had two wives; by his first wife he had two sons, and by the second one son. After the father's death, all the brothers lived together as an undivided family, and jointly possessed the paternal estate. One of the sons by the first wife died, leaving a widow, who is since dead. Subsequently to her death, the other son by the first wife, and lastly the son by the second wife died, each leaving a widow. In this case, it is presumed the property will be made into three shares, of which two will go to the widow of the son by the first wife, and the remaining one to the widow of the son by the second wife. Is this the proper distribution according to law?

Half brothers share equally with whole brothers, if undivided.

R. 1. If the original proprietor had three sons by two different wives, as mentioned in the question, and the son whose widow is dead, died while they were living together as an undivided and joint family; in this case, the uterine and half brothers should have succeeded in equal shares to the property left by their deceased brother. On their death, their widows are entitled to the succession.

Q. 2. Should it be proved, that the three brothers divided the estate among themselves, and died one after another, as mentioned in the preceding question, in this case is there any particular rule for the widows' succession?

R. 2. Supposing the brothers to have made partition of their paternal estate, and to have taken possession of their respective shares, and subsequently one of the sons by the first wife to have died, leaving no widow, his brother of the whole blood is exclusively entitled to his share. On his death, his widow is entitled to two shares, that is to say, to the one which was her husband's original legal share, and to the other which devolved on him from his uterine brother. The widow of the son by the second wife is only entitled to the share of which her husband died seized.

But are excluded by a whole brother, if separated.

March 13*th*, 1820.

CASE II.

Q. A *Sudra* family consisted of three brothers, the eldest of whom died leaving two sons, the second a widow, and the youngest three sons. The youngest son of the eldest brother died leaving a son, and then the widow of the second brother. Now all of the survivors above mentioned claim a share of the widow's estate. In this case, are they all entitled to the succession; and if so, what is the extent of their respective shares?

R. On the death of the widow of the second brother, the property left by her will be equally shared by all the sons of her husband's brothers. The grandson of her husband's eldest brother is excluded by them.

A brother's son excludes a brother's grandson.

City of Dacca.

CASE III.

Q. A *Brahmin* had a family by his two wives; by the senior wife he had a son and three daughters, and by the junior four sons and two daughters. The father during his lifetime made a partition of his property, and assigned five equal portions to his five daughters, and five to his five sons, and died. All the sons and daughters took possession of their respective shares of the paternal estate. The four

sons by the younger wife died, leaving no male issue, and their mother enjoyed her sons' shares of the property, and died. Now there are the original proprietor's grandson by his senior wife, and a daughter by his junior wife, living. In this case, which of the survivors is entitled to succeed to the proportions which belonged to the original proprietor's four deceased sons by his junior wife, and which devolved on their mother by right of inheritance?

Ancestral property derived to a woman from her son, will at her death go to his half brother's son, to the exclusion of his sister.

R. 1. Supposing the *Brahmin* to have divided his real and personal estate among his children, viz. a son by his elder wife, and four sons by the younger one, and five daughters, and the sons to have enjoyed their respective shares, and the four sons by the younger wife to have died, leaving no heirs down to daughters' sons, their mother was entitled to their assets. If at the mother's death, their uterine sister and half brother's son were living, then their half brother's son is entitled to the succession, provided there be no heir down to the whole brother's son existing, and the sister is excluded from participation.

Q. 2. Supposing the daughter of the younger wife to have borne a son, in this case, is the daughter's son entitled to inherit from his uncles?

And sister's son.

R. 2. Where a sister's son and a son of the half brother are living, the former has no right of inheritance.

Zillah 24-Pergunnahs,
December 20th, 1816.

CASE IV.

Q. A widow instituted an action claiming her husband's share of the ancestral estate, consisting of lands and other property, against his nephews, who however came to an amicable adjustment with her, having assigned some im-

moveable property for her maintenance. From that time she continued to live with the daughter of her rival wife, which daughter had a son, since dead. On the death of the widow, her funeral rites were performed by the husband of the daughter of her contemporary wife, and the first anniversary of her death was celebrated by her husband's nephews. In this case, will the property, whether it be her husband's patrimonial or her own, purchased either with the produce of her husband's patrimonial or with her own peculiar property, devolve on her husband's nephews; or on the daughter of the rival wife?

Property derived to a woman from her husband goes at her death to his nephews; but not her peculiar property, which will go, in preference, to her step-daughter.

R. Supposing the childless widow to have received immoveable property out of her husband's patrimonial estate by compromise from his nephews for her maintenance, she would in such property have had only a life interest. Her property, therefore, with the exception of her peculiar estate, will devolve on her husband's nephew. But the property which she purchased with her subsistence, her jewels, her perquisites, and her gains, is termed her peculiar or separate property, and should devolve on the daughter of the rival wife.

Authorities.

"Her subsistence, her ornaments, her perquisites, and her gains, are the separate property of a woman." *Menu* says: "A woman's separate property goes to her daughter unaffianced, and to those not actually married."

City Patna,
July 4th, 1807.

CASE V.

Q. There were four uterine brothers, who having enjoyed their patrimony in common, died successively, leaving their respective heirs and representatives. The eldest brother having been destitute of male issue, had selected one

of the three sons of his second brother, and adopted him as his son after the mode prescribed by law. Of the remaining two sons of his second brother, one died leaving a son, and the other is alive. The third brother left a widow only as his heir, and the youngest brother had four sons. The heirs of all the brothers enjoyed their respective shares of the property; and the widow of the third brother dying, there are her husband's eldest brother's adopted son, his second brother's son, and son's son, and his youngest brother's four sons surviving. Under such circumstances, in what proportions will these persons respectively be entitled to inherit the estate left by the widow of the third brother?

The claimants to property left by a widow, which had devolved on her at her husband's death, being her husband's brother's son and grandson, another brother's adopted son, and a third brother's four sons, the property will be made into eleven parts, of which the adopted son will take one, and the other brothers five sons two parts each. The grandson will be excluded.

R. If the widow, having succeeded to her husband, (being the third brother,) died leaving his brother's five sons, an adopted son, and a grandson in the male line, according to the law of *Menu*, (who holds the first rank among legislators,) and other authorities, in the enumeration of the twelve descriptions of sons, the adopted son is ranked among the first six, who are heirs to collaterals; and agreeably to the law which is current in this district, an adopted son is entitled to a third share: consequently the property left by the widow of the third brother will be made into eleven parts; of which her husband's brother's five sons will take ten, or two shares each, and the adopted son the remaining one. This is conformable to the law of *Menu*, the *Oodvahatatwa*, *Dáyacramasangraha*, *Vivádárnavasetu*, *Dáyatatwa*, *Dattacamimánsá*, *Dattacachandricá*, commentary on the *Dáyabhága*, and other authorities.

Authorities.

Menu says: " Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, *except to their own father*, but kinsmen. The son begotten by a man himself *in lawful*

wedlock, the son of his wife begotten *in the manner before mentioned,* a son given to *him,* a son made or *adopted,* a son of concealed birth, *or whose real father cannot be known,* and a son rejected *by his natural parents,* are the six kinsmen and heirs." The text of *Vrihaspati* cited in the *Oodvahatatwa:* " *Menu* holds the first rank among legislators, because he has expressed in his code the *whole* sense of the *Veda:* no code is approved which contradicts the sense of *any law promulgated by Menu.*"

The following is the doctrine laid down in the *Dáyacramasangraha.* " In the partition made between legitimate and adopted sons, the legitimate son has two shares, and the adopted sons, who are of the same class with the father, take one share."

The *Vivádárnavasetu* contains the same reading as above.

The author of the *Dayatatwa* concurs in the preceding observations, saying: Among these " (the twelve sons of men,) except the son of the body, he who is of an equal class with his adoptive father shall receive one-third of thefather's estate, where a son of the body is living."

" A given son, abounding in good qualities *(yat'ha-jata)* existing: should a legitimate son be born at any time: let both be equal sharers of the father's whole estate." That must be construed, as supposing the former possessed of good qualities, and the legitimate son destitute of the same: on account of the epithet " *yat'ha-jata* (abounding in good qualities)." He in whom there is a '*jata,*' that is, an assemblage *(samuha)* of good qualities. This is the meaning; for the term '*yat'ha*' is significant of similitude, depending on quality." This is laid down in the *Dattacamimánsá.*

"Of the man to whom a son has been given, adorned with every quality, that son shall take the heritage, though brought from a different family." "With every quality," "class, science, observance of duties." This is the doctrine contained in the *Dattacachandricá.*

It appears from the commentary on the *Dáyabhága,* the *Dáyaeramasangraha, Vivádárnavasetu,* and other law books, that only in default of a brother's son, his grandson in the male line is entitled to the succession.

Calcutta Court of Appeal.

CASE VI.

Q. 1. Of five uterine brothers, the eldest, after a general partition, lived together with his second brother, and died childless. In this case, does the property left by the eldest brother devolve only on the son of his associated (second) brother, or on all the sons of his brothers ?

The son of a reunited brother succeeds as heir, to the exclusion of all the sons of unassociated brethren.

R. 1. If, of the separated brothers, two lived together, through mutual affection, as reunited in food and family, and one of such associated brothers died, leaving no nearer heirs, as son, and so forth, his property should devolve on his reunited brother only, on whose death his son is alone entitled to the succession. The sons of the unassociated brothers have no title thereto.

Authorities.

The text of *Yájnyawalcya,* cited in the *Dáyabhága* and other works of law: "A reunited (brother) shall keep the share of his reunited (co-heir), who is deceased; or shall deliver it to a son subsequently born." The term reunion is explained by *Vrihaspati:* "He who being once separated, dwells again, through affection, with his father, brother, or paternal uncle, is termed reunited."

Q. 2. Should the five brothers, having been separated, have all lived apart, and one of them have died leaving no male issue, in such case, on whom does his property devolve ?

R. 2. In default of heirs down to the mother, his brothers of the whole blood are equally entitled to the succession. The authorities are laid down in the *Dáyabhága*, &c.

A brother inherits next to a mother.

Authorities.

Devala:—" Next let brothers of the whole blood divide the heritage of him who leaves no male issue." *Yájnyawalcya*: " But an uterine brother shall thus retain or deliver the allotment of his uterine relation."

Menu:—" Of him who leaves no son, the father shall take the inheritance; or the brothers."

Zillah Hooghly,
Dec. 18*th*, 1820.

CASE VII.

Q. Of four uterine brothers, who lived together and enjoyed the profits of their paternal and acquired estates as an united family, two died before partition, leaving their widows. Subsequently to their death, the surviving brothers voluntarily selected an arbitrator to divide the estate between the parties. He (the arbitrator) adjudged, that the property should be made into four shares, of which two should be taken by the brothers, and the remaining two by the widows, whose shares were to be entrusted to the management of their husbands' brothers, from whom they were to receive the produce during their lives. The parties consented to this award, and acted upon it for some time. Subsequently one of the brothers died, leaving a widow and two sons under age. One of the widows, whose husband's share had been entrusted to her husband's deceased brother, died, and lastly the surviving brother

died, leaving sons. Under these circumstances, which of these survivors is entitled to succeed to the deceased widow's property, which devolved on her in virtue of inheritance, from her husband?

On the death of a widow, her property will go to the sons of her husband's brother who survived, to the exclusion of the sons of his brother who died before her.

R. Under the circumstances above stated, the widow's share (that is, one-fourth of the property as awarded by the arbitrator) should have devolved on her husband's brother, who survived her, and on his death it should go to his sons. The other survivors are excluded from the inheritance.

Authorities.

Ydjnyawalcya:—" The wife, the daughters, also both parents, brothers likewise and their sons."

This doctrine is conformable to the law as expounded in the *Ddyabhdga*, &c.

Calcutta Court of Appeal,
May 6th, 1819.

CASE VIII.

Q. There were three brothers, A, B, and C, who, having made a partition among themselves of their landed and other property, continued to live apart as a divided family. B had three sons, D, E, and F, of whom the eldest (D) died leaving an adopted son; the youngest (F) leaving no heir down to the wife, and the second (E) leaving a widow. The widow had enjoyed her husband's share, and died. Now D's adopted son, A's grandson, and C's sons are living, and claim the property left by E's widow. Under such circumstances, which of these claimants has a legal right to the succession?

The adopted son of a brother excludes

R. Under the circumstances above stated, the widow's husband's uterine brother's adopted son is exclusively

entitled to the inheritance, by reason of his conferring benefits by presenting oblations to the manes of her husband's mother, father, and grandfather. Her husband's two uncles' sons and grandson are excluded by his uterine brother's adopted son.

the son and grandson of an uncle.

Dacca Court of Appeal, December 10th, 1805.

Bholanath Surma, *versus* Rajchunder Surma.

CASE IX.

Q. A person who had lived in coparcenary with his two nephews, separated himself from them, and caused a partition to be made of the moveable and immoveable property. From that time he continued to live with his own son, who, having acquired some property, subsequently died, leaving a widow. By the widow's consent, one of the nephews performed the funeral ceremony, &c. of her deceased husband. The father next died, and his obsequies and funeral ceremonies were also performed by one of the nephews, and in the same manner as that of his son. It appears that the property in dispute is the joint acquisition both of the father and son. Both the nephews who are separated, and the widow of the son, are alive. Under these circumstances, which of the surviving individuals is entitled to the succession?

R. In default of heirs down to the brother, the nephews succeed, to the entire exclusion of a son's widow; and the son having died before the father, the nephews will be his heirs. Whosoever dies leaving no heir down to the great grandson, his widow is sole proprietor of his estate, whether it consist of land or personal property. Consequently the acquisitions of the son will devolve on his widow; but not the property left by his father, who survived him.

Brother's sons though separated exclude a son's widow.

May 18th, 1820.

CASE X.

Q. A person had three sons, A, B, and C, who divided their paternal estate, and took possession of their respective shares. A, the eldest, died, leaving three sons, one of whom died leaving no heir. The second son, B, died, leaving a widow and a daughter; and the younger son, C, died, leaving a daughter and her two sons. B's widow, who succeeded him in possession of his share of the property, left at her death a daughter, who also died subsequently, leaving a daughter. In this case, will the property left by B devolve on his daughter's daughter, or on his brother's sons?

Brother's sons exclude the daughter of a daughter.

R. Under the circumstances above stated, on the death of the second son, B, his property which he inherited from his father should have devolved on his widow, then on his daughter, on whose demise her father's brothers' sons are entitled to the succession. Here the daughter's daughter is excluded from inheritance. This opinion is conformable to the *Dáyabhága* and other works of law.

Zillah 24-Pergunnahs,
September, 1806.

CASE XI.

Q. Of two Hindu landed proprietors who were uterine brothers, one died childless, leaving a widow. The second brother, his son and son's son, died before the widow; but the second brother's son's widow, his own daughter, and daughter's two sons, are living. In this case, on the death of the first brother's widow, will her property devolve on the second brother's son's widow, or on his daughter or daughter's sons, or on the kinsmen sprung from the same paternal stock in the sixth degree of her husband? What is the law, supposing the first brother's widow to have lived with the second brother's son's widow jointly in respect of

food and other matters, and supposing the kinsmen sprung from the same paternal stock to have been beyond the seventh degree in point of relationship?

According to the best authorities of Hindu law, a brother's daughter's son has no right of succession.

R. Of the two uterine brothers, supposing one to have died leaving a widow, his property should have devolved on the widow. When the second brother died without a son or son's son, leaving a son's widow, his own daughter and daughter's two sons him surviving; then, on the death of his first brother's widow, neither the second brother's son's widow, nor his daughter, nor his daughter's sons, can have any title to the property of the first brother's widow: as a son's widow has no right of succession to her own father-in-law's property, *a fortiori* she can have no right of succession to her father-in-law's brother's property. The brother's daughter is not enumerated in the series of heirs of one who leaves no male issue. Although it is maintained in some copies of the *Dáyacramasangraha,* that a brother's daughter's son has a right of succession, yet this doctrine is wholly omitted in many copies of that tract, and there is no rule in the *Dáyabhága,* the commentary by *Sricrishna Turcálancára, Dáyatatwa,* or other authority to the effect that the brother's daughter's son has the right of succession. In this case, the kinsmen in the sixth degree sprung from the paternal stock first succeed, and in default of them, those who are of the seventh or more remote degree succeed, according to their proximity in the order of relationship. The fact of the second brother's son's widow living with her husband's uncle's widow, in respect of joint food and other matters, is not the means of conferring upon her any right of succession, as the *Dáyabhága* and other authorities current in Bengal contain no special rule to that effect, dependant on the division or non-division of the property. This opinion is conformable to the *Dáyabhága, Dáyacramasangraha, Dáyatatwa,* and other authorities current in Bengal.

Authorities.

"Where there are many relatives *(Gnatyah),* or remote kindred *(Saculyah),* or cognate kindred *(Vandhuva),* he who is nearest of kin shall take the wealth of him who dies without male issue." *Vrihaspati,* cited in the *Dáyatatwa* and *Dáyacramasangraha.*

Zillah Mymunsing,
March 5th, 1819.

CASE XII.

Q. There were four brothers, namley, Deokeenundana, Dhurneedhur, Ramkant, and Kaleepershad. Deokeenundana died in the month of Bysakh 1222 B. S. leaving two sons. In the year 1197 B. S. Dhurneedhur died childless, and his widow Sooradhunee also died in the month of May 1218 B. S. Ramkant died in the year 1216 B. S. and his widow Joymunee and two sons are still living; and Kaleepershad died childless in the year 1201 B. S. leaving a widow, who is still living. The brothers were possessed of some landed property in equal portions, and according to the award given by arbitrators, the widows of Dhurneedhur and Kaleepershad were in the enjoyment of the produce of their respective husbands' shares of the estate while they were living, and on their death their shares were divided between Deokeenundana, Ramkant, and their heirs. In this case, on the death of Sooradhunee the widow of Dhurneedhur, was the widow of Kaleepershad entitled to any portion of the produce which Sooradhunee received?

A brother's widow does not rank among heirs.

R. Supposing the widows of Dhurneedhur and Kaleepershad to have enjoyed the produce of their respective husbands' shares of the estate during their lifetime, on the death of one of them, being the widow (Sooradhunee) of Dhurneedhur, the widow of Kaleepershad had no right to get any portion of the produce which belonged to Soo-

radhunee, because the law no where recognizes the brother's widow as one of the heirs of a person who dies leaving no male issue*.

Sudder Dewanny Adawlut,
August 11*th*, 1824.

Musst. Jymunee Dibia, *v.* Ramjy Chowdry.

CASE XIII.

Q. Of four brothers who had jointly succeeded to an estate, the eldest died, leaving a widow and daughter's son, whose mother is dead; the second died, leaving a son; and the youngest of all, being the fourth, having been afflicted with leprosy, or a similar disease, died unmarried. Now there are surviving four persons, namely, the widow and grandson in the female line of the eldest brother, the son of the second brother, and the third brother, and they all claim the inheritance. In this case, how will the property be divided among the surviving claimants?

The claimants to a joint estate being a widow, a son, and a brother, they will each take a third, to the exclusion of a daughter's son.

R. Under the circumstances above stated, the widow of the eldest brother, the second brother's son, and the third brother are equally entitled to the succession; that is to say, each of them is entitled to one-third of the property. The daughter's son of the eldest brother has no right of inheritance while his grandmother survives†.

Zillah Jungle Mehals,
May 22*d*, 1819.

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* The property which was possessed by Sooradhunee, the widow of Dhurneedhur, will devolve on the heirs of Deokeenundana alone, by whom the heirs of Ramkant and Kaleepershad are excluded, because the persons from whom they inherited died prior to the death of Dhurneedhur's widow. This appears to have originated in the same case as No. 7, though the opinions were given in different courts.

† Supposing the fourth brother to have had no bodily defect, such as leprosy, or other disease, (which would prove an impediment to succession,) at the time of his father's death, he ought to have had

CASE XIV.

Q. A *Brahmin,* having caused partition of the landed estate and effects which he had held jointly with his uterine brother, lived apart, and died leaving a minor son, an unmarried daughter, a widow, and the sons of his brother above mentioned. His son subsequently died; then his widow. There is a possibility that his daughter will have male issue, and she claims her father's estate. Is this daughter, or are his brother's sons entitled to the succession?

A sister is excluded by brother's sons.

R. Under the circumstances above stated, the daughter is excluded; as, on the death of the proprietor, his property devolved on his son, on whom she confers no benefit by presenting funeral oblations to his manes. The brother's sons are entitled to the succession, because they present the funeral oblations to two ancestors, which the original proprietor was bound to offer.

Zillah Burdwan,
December 3*d,* 1819.

Unnapoorna Dibia, *versus* Gungahuree Shiromunee and others.

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an equal share with his brothers; as his right of inheritance accrued immediately on the death of the father; and if a title is once vested in a male heir, it cannot be lost again by any supervenient disqualification. Consequently, the subsequent disease of the fourth brother would have been no bar to succession; and on his death, his share, that is, one-fourth of the patrimony, would have devolved on his third brother, who survived him. The widow of his eldest brother, and the son of the second, would have had no concern with it, as they are excluded by the brother in this case. In the case here cited, however, it will be perceived that the second brother's son inherits, not as a nephew, but in succession to his father. It was not a question as to the inheritance of an uncle's property.

CASE XV.

Q. A *Brahmin* was survived by his five sons, two of whom died childless. The fourth brother had a son, who died before his father, leaving a widow and a maiden daughter; the fifth died without issue, and the third brother died leaving four sons, the eldest of whom died childless, and the second and third each left a son. The fourth brother's son's daughter, being married, has male issue. In this case, on the death of the fourth brother, who, among the survivors, are entitled to inherit his property?

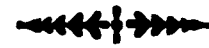
A brother's son inherits, to the exclusion of a son's daughter's son.

R. It appears that the son who died before his father left a widow and a maiden daughter, and subsequently the daughter having been married, had a son. But where there is a brother's son, and a son's daughter's son surviving, the brother's son is entitled to the succession: the deceased son's daughter's son has no legal claim to inherit from his maternal great-grandfather. This is the opinion of the authors of the *Dáyabhága* and other works.

March 21st, 1821.

SECTION VI.

OF SISTERS' SONS, &c.



CASE I.

Q. A person died, leaving a son and three daughters him surviving. Subsequently to his death, his son departed this life before his three sisters. Of the three sisters one died, leaving a son who is alive; and of the surviving, one is mother of two sons, who are living, and the other is a childless widow. Under these circumstances, how will the property left by the original proprietor be distributed among the survivors? Is any one of the survivors authorized to give or sell a portion of the property, such portion not exceeding his or her share?

Fathers' daughters' sons are the legal heirs, on failure of brother's sons.

R. On the death of the father, his entire estate should have devolved on his son only, by whom his daughters are excluded. If the son died, leaving no heir down to the brother's son's son, his father's daughters' sons are equally entitled to inherit from him. The sisters have no right to succeed their brother. Each of the father's daughters' sons is authorized to make a gift or sale of his own share of the property. The sisters under no circumstances are competent to make any alienation of the property. This opinion is conformable to the *Dáyabhága, Dáyatatwa, Menu,* and other legal authorities.

Authorities.

Goutama:—"Let ownership of wealth be taken by birth, as the venerable teachers direct."

"The right of a son to the father's property accrues on the extinction of the father's property; and by his own birth; and by such ownership, the son is competent to take his father's estate." This is the doctrine of the *Dáyatatwa.*

The following is the doctrine laid down in the *Dáyabhága:* "On failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son."

Menu says: "For even the son of a daughter delivers him in the next world, like the son of a son; and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss, by offering oblations of which he may partake."

Boudháyana, after premising, "A woman is entitled," proceeds, "not to the heritage; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit."

"The construction of this passage is, 'a woman is not entitled to the heritage.' But the succession of the widow and certain others, (viz. the daughter, the mother, and the paternal grandmother,) takes effect under express texts, without any contradiction to this maxim."

Menu: "The first gift, *or troth plighted,* by the husband, is the primary cause *and origin* of marital dominion*."

Zillah Nuddea.

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* It was not distinctly stated in this case whether there was any possibility that the sister, who was the mother of two sons, might bear other sons, or whether she was past child-bearing, or widowed. If the father's daughter's sons make partition of their maternal uncle's estate while one of them is capable of bearing more children, and

CASE II.

Q. A minor who had succeeded to some ancestral landed property, died leaving a step-mother, an unmarried uterine sister, and three paternal uncles. Subsequently to his death, his sister was disposed of in marriage, and had a son born in lawful wedlock. In this case, according to the law current in this country, on which of the persons above mentioned does the property left by the deceased minor devolve?

A sister's son excludes a step-mother and paternal uncles.

R. Under the circumstances above stated, the sister's son is exclusively entitled to succeed to his uncle's estate, he being the grandson of his (the minor's) father. The step-mother must be provided by him with food and raiment out of the estate. The paternal uncles were not entitled to succeed, because these was a probability of the sister's bearing a son.

Authorities cited in the *Dáyabhága.*—" On failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son, in like manner as it descends to the owner's daughter's son; for even the son of a daughter delivers him in the next world, like the son of a son." "*Yájnyawalcya* likewise uses the term 'gentiles' or kinsmen *(gotraja)*, for the purpose of indicating the right of inheritance of the father's and grandfather's son, as sprung from the same line, in the relative order of the funeral oblation." This is according to *Jimūtavahana.*

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subsequently to the partition a son be born, he should have an equal share of the inheritance, for the succession of a son after partition is in this case provided for. *Yájnyawalcya* declares: "When the sons have been separated, one afterwards born of a woman equal in class, shares the distribution. His allotment must positively be made out of the visible estate, corrected for income and expenditure."

The text of *Menu*, laid down in the same authority: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

The text of *Vrihaspati*, cited in the *Vyavahâratatwa* and other authorities: "The property of a house, arable land, a market, or other immoveables, which are possessed by a friend, or a near kinsman in the male or female line, who is not the proprietor, shall not be lost to the rightful owner*.

Dacca Court of Appeal,
May 31st.

CASE III.

Q. 1. Of two brothers the eldest had a son (since dead), whose son A is living. The second brother had a son, B, and three daughters, C, D, and E. B died unmarried. Of the daughters, C and D died, the former leaving no male issue, and the latter leaving a son, F. The last named daughter, E, is living, and has a son, G. The above individuals lived separately as a divided family, and B died possessed of his father's property. In this case, which of these three individuals, (that is to say, A, E, and F,) is entitled to succeed to the estate left by B?

Sisters have no right of inheritance, but their sons exclude the paternal uncle's son's son.

R. 1. It appears that B died, leaving no heir down to a daughter's son; consequently his father's two grandsons

* This is a correct opinion according to the law of Bengal, conformably to which the exposition was required to be given; but according to the law of Benares the sister's son is not expressly mentioned as an heir, and at all events can come in only in default of all *Samanodacas*, or lineal male descendants as far as the fourteenth in degree.

in the female line, that is, F and G, are entitled to share equally the property left by him, because they confer benefits on his father by offering the funeral cake to his manes. Here the father's daughters' sons are living, and succeed in default of his own daughter's son. The nearest kinsman who sprung from the same line, that is, A, the uncle's grandson, has no right of succession. E (the sister of B) has no title to inherit her brother's estate.

Q. 2. Supposing it to have been an invariable rule in the family, that the nearest kinsman of the same stock should inherit, though there be a daughter and daughter's sons living, and a member of such family die, leaving no son; according to law, will his property in such case devolve on the kinsman, or on the daughter and daughter's sons?

Unless the contrary should have been the invariable usage.

R. 2. Should it be proved that the usage stated in the question has been invariable and immemorial in the family of the parties, in this case B's property will devolve on his kinsman (A), to the exclusion of the other heirs.

Zillah Junglemehals,
June 16*th*, 1823.

CASE IV.

Q. Two brothers of the whole blood having divided their paternal estate, consisting of lands, houses, and other real and personal property, lived apart, in the enjoyment of their respective shares. The eldest brother was succeeded by his only son, who died without issue, leaving a sister of the half blood, her sons, a son of his uterine sister, and a grandson of his uncle. In this case, which of the survivors is entitled to inherit?

The son of a half sister succeeds to pro-

R. On the death of the eldest brother's son, in default of heirs down to the brother's grandson, all of his father's

daughter's sons* are equally entitled to the succession, because they severally confer benefits on him by presenting oblations of food to the manes of his three ancestors, including his father, and there is no difference between the sons of sisters of the whole and of the half blood.

perty jointly with the son of a whole sister.

Zillah Junglemehals,
August 2d, 1826.

CASE V.

Q. A person dies, leaving his paternal uncle's son's son, and a son of an uterine sister; in this case, are both the survivors entitled to the succession; if not, which of them has the superior title?

R. Under the circumstances above stated, the sister's son is exclusively entitled to the heritage.

According to the law as current in Bengal, a sister's son excludes a paternal uncle's grandson.

Authorities.

"In default of heirs down to the father's great-grandson, the father's daughter's son succeeds; for he presents the funeral cakes to the manes of the three ancestors of the deceased proprietor, of which his father partakes†."

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* The sons of the proprietor's own sister, and the sons of his half sister, have an equal right of inheritance. See note to the *Dáyabhága*, page 225.

† This question was circulated by the Register of the Shahabad court to certain contiguous jurisdictions for the opinions of their law officers. The Pundit of Zillah Behar, in his *Vyavasthá*, interpreting the text of *Yájnyawalcya*, "A wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, distant kindred," &c. stated, that in default of heirs down to the brother's son, the *gotraja* (kinsmen sprung from the same original stock) inherit; on failure of such heir, the distant kindred; and that the sister's son is ranked among the latter, who should succeed after the former. This opinion is conformable to the law as current in Mithila, Benares, and other provinces, as the followers of those schools do not rank the sister's son among the series of heirs enu-

CASE VI.

Q. A man died leaving two sons, a daughter and her son. Subsequently to his death his eldest son died without male issue, leaving the above named individuals him surviving, and then the younger died, leaving a widow and a daughter. Lastly, the widow and the daughter of the younger son died, the latter leaving her husband and an unmarried daughter. In this case, which of the survivors is entitled to the landed estate left by the father?

The sister's son excludes the daughter of a daughter.

R. On the death of the younger son, his widow was entitled to his entire property; and on her demise, her daughter derived from her a title to the inheritance. The daughter's husband and daughter are however excluded, because they confer no benefit on the deceased proprietor. The father's daughter's son is entitled to the inheritance*.

February 28th, 1817.

Jynarain Mookherjya, *v.* Ramruttun Chatoorjya.

CASE VII.

Q. A person possessing some landed property dies, leaving a son and four daughters. Subsequently to his death, the son takes possession of the whole of his paternal estate, and dies without male issue, leaving his sisters above named, two of whom died, leaving neither husband nor children; and of the surviving sisters, one had three sons, and the other a son by adoption. Under these circumstances, to what proportion of the estate will each individual survivor be entitled?

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merated in the text of *Yájnyawalcya;* but it is contrary to the doctrine prevalent in Bengal.

* The right of a father's daughter's son is admitted by the followers of the Bengal school only; the law as current in Benares and Mithila, does not acknowledge him to be an heir of his uncle, and there are not wanting authorities for the right of succession of a daughter's daughter; but this doctrine is nowhere respected. See Chapter on Inheritance, vol. i.

R. Under the circumstances above stated, according to law, the estate will be made into seven parts, of which the three sons of one sister will take six shares, and the adopted son of the other the remaining one*.

In Bengal, the adopted son of a sister takes a seventh, as coheir with three sons of another sister.

Zillah Hooghly,
September 28th, 1812.

CASE VIII.

Q. A person dies, leaving a widow as his heir; and the widow dies, leaving her husband's paternal grandfather's brother's grandson and great-grandson in the male line, and also her husband's sister's son. In this case, which of these three surviving individuals is entitled to succeed to her husband's estate?

R. The sister's son is, by law, entitled to the inheritance. The paternal grandfather's brother's grandson and great-grandson have no claim to the succession.

A sister's son excludes paternal grand-uncles' descendants.

Zillah Burdwan,
May 12th, 1823.

CASE IX.

Q. A landed proprietor, having filed a suit in a court of justice to obtain possession of his paternal landed estate, died previously to its decision, leaving an uterine sister, her son, the son of another sister, and a descendant in the fourth degree of the paternal line. Subsequently to his death, the sister's son claimed to be his representative, and died while the claim was pending. There are now surviving his sister, her son's widow, the son of another sister, and the descendant in the fourth degree of the

* The above is an accurate exposition of the law as current in Bengal; but according to the law of Benares, the property would have been made into ten parts, of which the adopted son would take one. There is no express authority for the succession of the adopted son of a sister, but his right is admitted by inference.

paternal line. Under these circumstances, which of the surviving individuals is entitled to the succession?

A sister's son excludes a descendant in the male line of the great-grandfather.

R. Under the circumstances above stated, on the death of the original proprietor, his sole heirs were his two sisters' sons, by whom his great-grandfather's descendant, (in other words, the fourth person in descent of the paternal line,) is excluded from the inheritance. It is mentioned in the *Dáyatatwa,* that he is entitled to the succession who confers the most benefit in presenting funeral oblations.

The person in the fourth degree of descent is indeed a giver of funeral oblations to the proprietor's great-grandfather; but his sisters' sons present oblations to his three ancestors, including his father, (who is principally considered.) Consequently his great-grandfather's descendant cannot inherit, where there are his father's daughters' sons surviving.

The text of *Menu* cited in the *Dáyabhága:* "To three must libations of water be made; to three must oblations of food be presented; the fourth in descent is the giver of those offerings; but the fifth has no concern with them."

But on failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son. This is the opinion of *Jimūtavahana.*

Sricrishna says:—"The father's daughter's son inherits, though there be the grandfather's uterine brother or the like living."

Consequently, on the death of the proprietor, his father's two daughters' sons should have succeeded to the property which their uncle left; and on the death of one of the sis-

ters' sons, his widow is entitled to her husband's share of the estate.

To this effect is the text of *Vrihat Menu,* cited in the *Dáyabhága:* "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share*."

Zillah Mymunsingh,
May 18*th,* 1823.

CASE X.

Q. A person died, leaving a widow and a sister's son, who died before the widow, leaving a son. Is the sister's son's son entitled, on the death of the widow, to inherit the property left by her?

A sister's grandson is not an heir.

R. The sister's son's son, whose father died previously to the widow's decease, has no title to the succession.

Zillah Sylhet,
May 8*th,* 1812.

CASE XI.

Q. A, (a Hindu,) died, leaving a widow and a father. Subsequently the father died, leaving a widow (B), not the mother of A, a minor son (C), and a sister's son (D). Afterwards C died childless. Subsequently to C's death, the widow (B) took possession of the property left by the father, and executed a will assigning over the entire property to her husband's sister's son (D), and died without putting the legatee into possession of the property willed away. In this case, is the will, according to the law as current in Mithila and Bengal, valid and binding? On the other

* It will be perceived that this case and the one preceding were answered according to the law of Bengal.

hand, supposing no will to have been executed, does the property in question go to the sister's son of A's father, or to his widow, by right of inheritance?

According to the law of inheritance as current in Bengal, the father's sister's son is the eighteenth in the order of succession; but according to the law as current in Mithila and Benares, he is not entitled to the inheritance so long as there is a *gotraja* or gentile, which term includes all those descended from the same primitive stock, as far as the fourteenth generation.

R. Supposing A to have died, leaving a widow and father, and the father to have died subsequently, leaving a widow (B), being the step-mother of the deceased A, a minor son (C), and a sister's son (D), and the minor C to have died childless, and subsequently to this, the widow of the father to have enjoyed the property in question, to have assigned it to her husband's sister's son (D) by the execution of a will in his favour, but to have died without putting D into possession of the property therein specified; in this case, according to the law as current in Mithila and Bengal, the will cannot be held to be valid and binding. And the heirs who are entitled to succeed to the property may be thus enumerated. The widow of the first deceased, (A,) who died before his father, is, according to the law as current in Mithila and Bengal, competent to inherit her husband's property, supposing it to have been divided and separated from that of his co-heirs. If the property was held in joint tenancy, his widow, according to the law as prevalent in Bengal, is entitled to succeed to that portion which was her husband's share; but, according to the law as current in Mithila, she would not be entitled to succeed even to this, for the law expounders of that school declare, that the widow's right of succession depends on the partition of the joint stock, partition being, according to them, the sole cause of creating individual proprietary right. Therefore of A's property, so much as was not his *vibhucta* or divided, and *asadharana* or exclusive property, according to the law as current in Mithila, and so much as was not his individual proportion, or his share of the joint property, according to the law as current in Bengal, will on the death of the first deceased son, (A,) devolve entirely on his father, even though his widow was living. On the death

of the father, the whole property to which he (the father) succeeded, should have devolved on his minor son (C.) At the death of such son, leaving no child, his property should have devolved on his next heir, that is, according to the law as current in Mithila, in default of heirs from the widow down to gentiles, on his father's sister's son, he being ranked among the cognates; and not before: but, according to the law as current in Bengal, in default of heirs from the widow down to the grandfather's grandson, the father's sister's son is entitled to the succession, he being the grandfather's daughter's son.

This opinion is conformable to the *Vivádachintámani* and other authorities, as current in Mithila, as well as to the *Dáyabhága* and other law tracts, as prevalent in Bengal.

Authorities.

1. The passage of the *Mahabhárata* cited in the *Vivádachintámani,Dáyabhága,* and other authorities: "*Simple* enjoyment is declared to be the fruit which women gather from the heritage of their lords: on no account should they waste the estate of their husbands."

2. "The term "waste" means to give, sell, or make other alienation at pleasure." The *Vivádachintámani.*

3. The text of *Vishnu* cited in the *Vivádachintámani* and other law tracts:—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, to his daughter; failing her, to his mother; in her default, to the father, and so forth."

4. "This rule applies to the husband's divided property." The *Vivádachintámani.*

5. "Therefore the doctrine of *Jitendriya,* who affirms the right of the wife to inherit the whole property of her

husband, leaving no male issue, without attention to the circumstance of his being separated from his co-heirs or reunited with them, (for no such distinction is specified,) should be respected." The *Dáyabhága.*

6. "On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text (of *Yájnyawalcya*): "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's paternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred." This must be understood to be the order of succession here intended." The *Vivádachintámani.*

7. The following is a text of the *Dáyabhága*:—" The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering."

8. In the case of non-partition, the text of *Sancha* cited in the *Vivádachintámuni* applies: "To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food, and old garments which are not tattered."

Sudder Dewanny Adawlut,
December 18*th*, 1826.

Mussummut Hureea Beebee, *v.* Bhowanee Lal.

CASE XII.

Q. A widow of the *C'shatrya* tribe, who was in possession of her husband's estate, died childless, leaving, as the only claimant to the property, her husband's maternal uncle's son. In this case, is the individual above alluded to entitled to inherit the property left by the widow, by reason of there being no other natural heir or adopted son?

The maternal uncle's son is heir after the mother's sister's son, according to the *Mitácshará*, and according to *Sricrishna's* commentary on the *Dáyabhága*; but according to the *Dáyacramasangraha* and other Bengal authorities, he ranks immediately after the maternal uncle.

R. If the widow of the childless man in question died possessed of her husband's estate, leaving her husband's maternal uncle's son, and there be no one of her husband's heirs surviving down to the mother's sister's son, then, according to the series of heirs enumerated in the *Mitácshará* and other authorities current in the western provinces, and if there be none surviving down to the maternal uncle, according to the series of heirs as enumerated in the *Dáyacramasangraha* of *Sricrishna Tarcálancára, Vivádárnavasetu*, and *Vivádabhangárnava*, which prevail in Bengal, and if there be none surviving down to the mother's sister's son, according to the series of heirs as enumerated by *Sricrishna Tarcálancára* in his commentary on the *Dáyabhága*, then, agreeably to these three authorities, the entire property left by the deceased widow will devolve on her husband's maternal uncle's son, he being ranked among the *Atmabandhu*, or own cognate kindred, provided at her death she left no adopted son. This opinion is consonant to the *Mitácshará* and other authorities as current in the western provinces, as well as to the *Dáyabhága*, the commentary by *Sricrishna Tarcálancára* on the *Dáyabhága*, the *Dáyacramasangraha, Vivádárnavasetu, Vivádabhangárnava*, and other law tracts as prevalent in Bengal.

Authorities.

1. The text of *Yájnyawalcya* cited in the above authorities: "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates," &c.

2. "On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text: "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred." Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." The *Mitácsharà.*

4. Failing him (the maternal grandfather), the maternal uncle; (in default of him), his son; and (on failure of him), his grandson. In default of the maternal uncle's grandson, the maternal grandfather's daughter's son succeeds.

5. The succession devolves on the maternal uncle and the rest, who present oblations which the deceased was bound to offer. In default of these, the heritage goes to the son of the owner's maternal aunt; or, failing him, it passes successively to the son and grandson of the maternal uncle. The commentary by *Sricrishna Tarcálancára* on the *Dáyabhága.*

3. "On failure of any lineal descendant of the paternal great-grandfather, down to the daughter's son, who might present oblations in which the deceased would participate; to intimate, that, in such case, the maternal uncle shall

inherit in consequence of the proximity of oblations, as presenting offerings to the maternal grandfather and the rest, which the deceased was bound to offer: *Yájnyawalcya* employs the term "cognates" *(bundhoo.)**

Sudder Dewanny Adawlut,
May 30th, 1826.

Mussummaut Munnoo Beebee, *v.* Gokulchund.

CASE XIII.

Q. An unmarried person, possessed of some immoveable property, which had descended to him from his father and grandfather, died leaving an adult sister, whose husband is living; a paternal grandmother, and several paternal uncles him surviving. In this case, which of these claimants is entitled to inherit? Supposing the grandmother to have died before the other individuals specified in this case, which of the survivors is entitled to succeed to the property?

The claimants being a childless sister, a paternal grandmother, and paternal uncles; the grandmother is the heir.

R. If any person, being in possession of certain ancestral immoveable property, die, leaving a sister him surviving, whether she be a minor or an adult, and whether she have a husband living or is a widow, such sister cannot inherit. Her sons may legally inherit; but it appears from the question, in this case, that the sister is destitute of male issue; consequently the grandmother was entitled to the succession, and if she died before the other individuals mentioned in the question, then the succession should

* Two conflicting opinions are ascribed to *Sricrishna Tarcálancára. Sricrishna,* the author of the commentary on the *Dáyabhága,* makes the maternal uncle's son succeed after the mother's sister's son, thus assigning to him the 33d place in the order of succession; while *Sricrishna,* the author of the *Dáyacramasangraha,* makes him succeed immediately after the maternal uncle, thus assigning to him the 30th place. The latter doctrine appears to be the most approved.

devolve on the paternal uncles. This opinion is consonant to the *Dáyabhága,* its commentary the *Dáyacramasangraha, Vivádabhangárnava,* and other authorities.

Authorities.

The *Dáyabhága:*—"On failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son." The commentary (on the above authority), "She (the sister) is excluded from the succession, because she is no giver of oblations at periodical obsequies, being disqualified by sex. If there be none, the father's own brother is heir."

The *Dáyacramasangraha:*—"On failure of the brother's grandson, the succession goes to the father's daughter's son; in default of him (the paternal grandfather), the paternal grandmother is heir; failing her, the uncle succeeds."

The same opinion is held by the authors of the *Vivádabhangárnava,* and *Vivádárnavasetu.*

Calcutta Court of Appeal,
January 6th, 1827.

CASE XIV.

Q. A person died, leaving his paternal grandmother, two paternal uncles, and an uterine sister, about twenty-five years of age, whose husband is aged about thirty-five, by whom she had two daughters, the one five and the other three years old; and there is a probability of her having male issue. In this case, which of the above named individuals is entitled to inherit the estate of the deceased? If the probability of the sister's bearing male issue is a bar to the succession of the other claimants, and the grandmother be dead; in this case, whether should the management of the estate be confided, in the mean time, to the paternal uncles, or to the sister? Supposing the sister to have no

male issue, and that the possibility of her having any is extinct; in this case, who is entitled to the succession?

R. Supposing the deceased to have been survived by his paternal grandmother, two paternal uncles, and an uterine sister, who is likely to have male issue, then, on the death of the grandmother, the uncles who confer benefit to the deceased by offering the funeral cake to his grandfather and great-grandfather are entitled to the property left by him; and if the sister have no male issue, they (the uncles) are the successors, their right of inheritance being then unqualified. Consequently the management should be confided to them, and not to the sister, for she cannot by law be considered as heir to her brother. But whenever a son may be born to her, he will be entitled to succeed to the property. This opinion is conformable to the *Dáyabhága, Dáyacramasangraha,* the commentary on the *Dáyabhága,* and other authorities.

And failing the paternal grandmother, the paternal uncles succeed; but their property is divested, should the sister subsequently have male issue.

Authorities.

The *Dáyabhága*:—"The paternal uncle is indeed a giver of oblations to the grandfather and great-grandfather of the proprietor."

The *Dáyacramasangraha*:—"Failing the paternal grandmother, the uncle succeeds; for he presents two oblations to the paternal grandfather and great-grandfather of the deceased owner."

The commentary on the *Dáyabhága*: "The sister is excluded from the succession, because she is no giver of oblations at periodical obsequies, being disqualified by sex."

"They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

Calcutta Court of Appeal,
February 14th, 1827.

SECTION VII.

OF FELLOW STUDENTS, &c.

CASE I.

Q. On the death of a childless widow, who left apparently no heir, her property was seized by the ruling power, and a proclamation was issued for the appearance of her heir and representative within a certain period. After the expiration of the period fixed, a *gosain* appeared, and presented a petition for the property, alleging that the widow was his father's disciple; and he also proved, by the testimony of his four pupils, that she was his father's follower: but, according to the established usage of this country, no *gosain* has ever received any property of his disciple, and it does not appear, that in the instance of any disciples of a *gosain* dying without an heir, such *gosain* received his property under the jurisdiction of this court: under these circumstances, is the *gosain*, according to law, entitled to succeed as her heir; and can he, as such, claim her property?

An *acharjya* or spiritual teacher is ranked among the heirs according to the Hindoo law, but not a *gooroo*. In default of heirs, the property of a person deceased escheats to the

R. In default of heirs down to the *samánodacas,* or kinsmen allied by the common libation of water, the succession devolves on the spiritual teacher *(achárjya.)* The *gosain* is the widow's *gooroopootra,* or the son of her spiritual guide. A *Gooroo* is not termed an *Achárjya.* If the widow was not of the *Brahminical* order, her property should escheat to the king, who alone becomes heir. So *Menu* directs:—" The property of a *Brahmin* shall

never be taken by the king: this is a fixed law. But the wealth of the other classes, on failure of all heirs, the king may take."

king, except he be of the *Brahminical* order.

Zillah Hoogly,
April 3d, 1817.

CASE II.

Q. A religious mendicant died, leaving no heir; but there is a person who calls himself the pupil of the same spiritual teacher with the deceased, and alleges that he is therefore entitled to the succession. Is such person recognized as a brother by the fraternity of mendicants?

R. There is no provision in the *Dáyabhága* and other works of law, that on the death of a religious mendicant his spiritual teacher's pupil has the right of succession to his estate, and there is no relationship between them; but the person who becomes a follower of the spiritual teacher is universally termed a religious brother by the fraternity of devotees. If such person attend the deceased on the point of death, and perform his exequial rites, and if the spiritual teacher himself disclaim all right of succession, such religious brother is entitled to the inheritance. This doctrine is justified by universal usage.

A fellow disciple is by general usage allowed to be heir, in default of nearer claimants.

CASE III.

Q. A *Byragee,* or religious mendicant, having consecrated an idol, died, leaving considerable property. Subsequently to his death, his brother claims his estate; and a person who is a stranger to him in blood also claims the estate, and adduces sufficient evidence to prove that the mendicant had left the order of a housekeeper, had become an ascetic, and had made him (the claimant) his pupil and follower, on the strength of which he had performed the exequial rites of the deceased. In this case, which of these persons is entitled to inherit the property of the defunct?

To the property of an ascetic, his pupil or follower is heir, not his relations by blood.

R. Supposing the mendicant to have actually left the order of an householder, and to have become an ascetic, in this case, his follower and pupil is entitled to the inheritance, to the entire exclusion of his brother, whose fraternal relation can be held to have effect so long only as the proprietor continued in the order of a householder.

Authorities.

Vrihaspati:—"Decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, there might be a failure of justice*."

August 5*th*, 1817.

CASE IV.

Q. Balram Seta Das, (a devotee,) had appropriated a building for religious worship, and had established in it an image of the deity. On his death, the plaintiff, who is the widow of the son of Pretram, his *Purohit* or spiritual preceptor, preferred a claim to the temple in question; a son's son of the founder being then living. Under these circumstances, according to the Hindu law, is the claim of the plaintiff in virtue of the relinquishment or appropriation valid, or is the heir of the founder to be considered as owner of the temple?

The heirs of the founder have a com-

R. The building, with the deity, was relinquished to the *Purohit*, and not given to him; indeed, the founder having

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* The above opinion is doubtless correct, though the authority cited in support of it appears wholly irrelevant. The following passage of the *Dáyabhága* justifies the exposition of law as given in reply to the question. "The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor take. On failure of these, the associate in holiness, or person belonging to the same order, shall inherit."—*Dáyabhága*, page 223.

relinquished a building in which he had established an image of the deity, did in fact give that building to the deity; hence it belonged to the deity solely: for the deity existing therein, it was impossible to give it to another. By mere relinquishment, proprietary right cannot be established; and, consequently, as the *Purohit* himself never possessed any proprietary right, none can possibly appertain to the widow of his son. The appropriation, which was an auspicious act, is common to the heirs of the founder, in whom the right of enjoyment is vested.

mon right to the use of a building relinquished by him for a place of worship: not so the heirs of the *Purohit*, or spiritual preceptor of the founder.

City of Moorshedabad.

Lukhee Thakoorain, *v.* Kewul Punthee and others.

SECTION VIII.

OF SONS' WIDOWS, &c.

CASE I.

Q. A person had five sons, the eldest of whom died without male issue, leaving a widow. Subsequently to his death the father died, leaving four sons him surviving. In this case, is the widow of his son entitled to share his immoveable property, to the extent of her husband's share, with her late husband's brothers?

A woman cannot inherit immediately from her father-in-law.

R. Under the circumstances above stated, the widow has no title to any portion of the estate left by her father-in-law; but had her husband survived him, she would take the share, on her husband's death, to which he had succeeded. This is the law as contained in the *Dáyabhága* and other legal authorities.

City of Dacca,
July 15*th*, 1817.

CASE II.

The widow of a son is excluded by a brother's sons, but she must be maintained by them.

Q. There were two brothers, the elder of whom had a son, who died during his father's lifetime, leaving a widow and two daughters. In this case, on the death of the elder brother, is his son's widow, or his brother's sons, his brother being dead, entitled to inherit from him. If the former, as on her demise there were two sons and two daughters of a daughter, and a son of another daughter living, which of these survivors are entitled to the property which devolved on the widow by right of inheritance?

R. The elder brother having died leaving no heir down to the brother, his brother's sons are equally entitled to the succession, but not his son's widow, as the son died before him.

Authorities.

Vishnu:—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brothers' sons."

The brothers' sons having succeeded to their uncle, will provide his son's widow with the proper maintenance.

Zillah Hooghly,
May 22d, 1821.

CASE III.

Q. 1. A widow, having a daughter and son-in-law, adopted a son, with the sanction of her late husband, and disposed of him in marriage. The adopted son died, leaving a widow, a sister, a sister's son, and his adopting mother, who is since dead. In this case, will the property left by the original proprietor devolve on the adopted son's widow, or on the daughter's son?

An adopted son's widow takes the property of his adopting mother, to the exclusion of such adopting mother's daughter and her sons.

R. 1. Supposing the widow to have adopted the son with her late husband's permission while there were her daughter and other relations living, the son adopted was alone entitled to the property of his adopting mother, which had devolved on her at the death of her husband. On the death of the adopted son, in default of heirs down to the great-grandson, his widow is competent to take the property, even though his adopting father's daughter's son exists. This is the law on the point stated.

Q. 2. If the widow, by direction of her deceased husband, adopted a boy, having paid a certain sum of money as the consideration to his parents, and such adopted son died without having taken possession of his adopting father's property; in this case, is his widow entitled to the original proprietor's estate or otherwise?

Even though the adopted son should not have taken possession before his death.

R. 2. If the original proprietor left directions with his widow to adopt a boy, and the widow, paying a consideration, adopted one according to the forms prescribed by law, whether the adopted son died with or without taking possession of his adopting father's property, in this case, his (the adopted son's) widow is alone entitled to the succession, and the others have no concern with it*.

City Chinsurah,
August 20th, 1820.

CASE IV.

Q. B, son of A, having died during the lifetime of his father, will his widow take any share in his property, or in that of C and D, his full brothers, who died after their father; and if so, what proportion thereof?

A son's widow has no legal claim of inheritance.

R. If A had three sons, B, C, and D, of whom B died without issue, leaving a widow, and if after this A died, leaving heirs, his two remaining sons him surviving, the right of B to the property left by A, is barred by reason of his having died during his father's lifetime. His widow therefore is not entitled to any share in the property of her deceased husband's father. She is entitled to receive maintenance, therefore, and to take by inheritance, during her life, any property of which her husband had possession during his life.

* In this case, the son adopted became on his adoption *ipso facto* heir to the property of his adopting father, and his widow therefore be came entitled to the property as his heir, not as heir to his adopting mother.

If either C or D died, during the life of their mother, she would take the share of the deceased; if they both died before, she would take the property of both. If the mother died first, and then the two brothers, the sons of their sister would have taken the property of the two brothers, and after their death, their mother (the sister of C and D) would have succeeded thereto, as their heirs. If the mother of C and D, and the sons of their sisters, died during their lifetime, their sister cannot inherit; and in that case, on the death of C and D, the lineal descendant in the male line of A who is alive and next of kin to those persons, will be entitled to take the said property. This *Vyavasthá* is according to the *Dáyabhága, Dáyatatwa,* and other authorities current in Bengal. *Menu* cited in the *Dáyabhága* and elsewhere. "Brothers, on the death of their father and mother, having divided the ancestral property, will take equal shares: during the lifetime of their father and mother, they have no power over that property." *Devala* in the *Dáyabhága* and elsewhere: "Sons, after their father's death, will divide the paternal property: if a faultless father be alive, the sons have no power over his property."

And is excluded by her husband's sisters' sons.

But his sister cannot inherit, except through her sons' mother.

Yájnyawalcya in the *Dáyabhága* and elsewhere: "On the failure of son or son's son, the wife and the daughter, also both parents, brothers likewise and their sons, gentiles *(gotraja)*, cognates *(bundhoo)*, take the estate in succession." *Dáyabhága*: "On failure of sons and their male issue, the sons of daughters of the father shall obtain the property*."

* The same doctrine, that the widow of a son who died before his father is not entitled to inherit the father's estate, was laid down in the case of Mussummaut Ayabutee, *v.* Rajkishen Sahoo, Sudder Dewanny Adawlut Reports, vol. iii. p. 28. See also Elem. Hin. Law, Appendix, p. 240, et seq. I observe among the Bombay Reports (vol. viii. p. 510) a case in which, in answer to the question as to whether the grandsons (sons of the daughter) or daughter-in-law (widow of the son) of a

person deceased who died without other heirs, would succeed to his estate, the Hindu law officers are reported to have replied, that according to the *shaster*, the widow of the son of the deceased was his heir, but no authority is given for this doctrine. It is true that the author of the *Vijyanti*, a commentary on *Vishnu*, supports the claim of the deceased son's widows; but we have the authority of Mr. Colebrooke, that the doctrine is not generally received. See Elem. Hin. Law, Appendix, p. 11 and 243.

CHAPTER II.

OF MAINTENANCE.

CASE I.

Q. A person turned his wife out of his house, whereupon she went and lived in the family of her own brother, and now claims her maintenance from her husband. In this case, can she, according to law, sue for the means of support?

A husband expelling his wife without sufficient cause is bound to maintain her.

R. The wife having been expelled by her husband from his house, and living with her brother's family, is entitled to obtain maintenance from her husband, provided the husband was not justified in expelling her by the circumstances of the case. This is the received opinion.*

Dacca Court of Appeal,
September 9th, 1815.

Rampriya, *versus* Bhriguram.

CASE II.

Q. If a man expel his wife from his house, or if she wilfully elope from her husband, and live in the family of her mother; in either case, is she competent to sue for her maintenance?

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* If the wife was turned away on account of unchastity, or similar offence, she has no right to be maintained.

By voluntary desertion of her husband the wife loses her right to maintenance.

R. If the husband turned the wife out of his house, and she live with her mother; in such case, she is entitled to maintenance. But if she without her husband's sanction leave him, and live with her mother, she has no right to maintenance.

Zillah Chittagong,
January 14th, 1820.

CASE III.

Q. A person had two wives, who quarrelled with each other, and the husband turned away his senior wife from his family house. In this case, is the first wife, during the husband's life, entitled to a share of his property? If so, to what proportion?

But an expelled wife is not entitled to demand a share of her husband's property.

R. Under the circumstances stated, the wife is not entitled to demand a share of her husband's property, because she cannot exercise any independent right, as *Yájnyawalcya* says: "All wives, sons, slaves, and unmarried girls, are dependant."

"A woman must be carefully restrained from the smallest illicit gratification; night and day she should be guarded by her mother-in-law and by other venerable matrons*."

"*Menu* has declared, that a mother and a father, in their old age, a virtuous wife, and an infant son, must be maintained, even though doing a hundred times that which ought not to be done."

According to the preceding authorities, the eldest wife is entitled only to a sum sufficient for the necessary expenses attendant on her food and raiment, even though expelled

* *Vrihaspati.*

from her husband's house. It is the general rule, that a wife must be maintained by her husband.

Zillah Sarun,
July 10th, 1812.

CASE IV.

Q. A widow was in possession of some property, which had devolved on her at the death of her husband. The widow of her son (who died before his father) sues her for alimony to a specific amount; and on referring the case to a *pundit*, the following *vyavasthá* was given: that "if a widow live in the house of her mother-in-law, the latter should afford her food and raiment; but that no rules as to a specific portion on account of alimony had been laid down in the law, and that this should be determined by extent of means." Is it then necessary, supposing that a disagreement should subsist between the mother and daughter-in-law, that the latter should live with the former? If there should be any established rule making it incumbent to give alimony to the family of the person in possession of the estate, and the person in possession should not give alimony in proportion to the extent of the means, in such case, is it competent to any authority to fix the amount to be given?

R. While the father and other relations of her husband exist, the residence of a widow in their house is declared to be obligatory on her; and the law does not contemplate any case of opposition to this rule, as in the following text.

There is no provision for alimony in the Hindu law, but only for maintenance.

The father-in-law and the rest are bound to maintain a virtuous and childless widow; but there is no provision for a case in which alimony* may be sued for, not having been

* This word, according to its rendering in English law, is not exactly applicable; but there does not appear to be any other better suited to express the sense of the original. Though the Hindu law does

given in proportion to the means: "Let them (the brothers) allow a maintenance to his (brother's) women for life."

The text says: "A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of law, or according to immemorial usage, (for the word *yucti* admits both senses,) there might be a failure of justice."

Patna Court of Appeal,
February 25th, 1807.

CASE V.

An unchaste widow is not entitled to maintenance from her husband's brothers, even though she may have resigned her right to his property in their favour, in consideration of such maintenance.

Q. There were four brothers, one of whom died leaving a widow, who, having assigned over to them her husband's property, moveable and immoveable, by gift, obtained an agreement from the donees that they would provide her with food and raiment. Subsequently she became pregnant, the fruit of an adulterous intercourse; on which she was expelled from the family house, and the donees now refuse to support her. In this case, has the widow a legal claim to her maintenance from the donees?

R. A virtuous widow of a person who leaves no male heir down to the great-grandson, succeeds her husband; and if she violate his bed, she becomes degraded. Consequently the widow described has no right to her husband's

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not recognize alimony, yet the amount of maintenance is specified with sufficient precision. *Balambhatta* prescribes, that each evening one *prastha* of rice be meted out to the widow, and at the end of every three months a new cloth be given to her. The same provision is made by the author of the *Smritichandricá*. In the case of Musst. Bheloo, *versus* Phool Chand, (Sudder Dewanny Adawlut Reports, vol. iii. page 223,) it was laid down by the *pundits*, that if the heirs of a person deceased neglect to assign to his widow a reasonable maintenance, the judge is at liberty to award a sum sufficient for that purpose; and in the case in question, the court awarded to the widow the sum of 20 rupees *per mensem*.

heritage, and cannot claim her maintenance, even though she obtained an agreement for her subsistence previously to her offence.

Authorities.

Vyasa:—"After the death of her husband, let a virtuous woman observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and especially the adoration of *Vishnu*, practising constant abstemiousness."

Cátyayana:—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Náreda:—"Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But, if they behave otherwise, the brethren may resume that allowance."

City Dacca,
January 21st, 1823.

CASE VI.

Q. An individual, by trade a blacksmith, had three sons, whom he brought up and supported until they attained the age of majority, when they separated themselves from each other, and took possession of their father's estate. The father is now old and decrepit, and the sons do not provide him with food and raiment. In this case, is the father entitled to maintenance from his sons, or otherwise?

Sons are bound to maintain their parents.

R. The sons are bound to support their aged parents. This is consonant to the doctrines laid down in the *Vivádabhangárnava* and other works.

The following passage is cited in the *Vivádabhangárnava:* "*Menu* declared, that a mother and father in their old age, a virtuous wife, and an infant son, must be maintained, even though doing, a hundred times, that which ought not to be done*."

Zillah Nuddea.

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* It is not distinctly stated in this case, whether the property which the sons took possession of, was their father's self-acquisition, or descended to him from his ancestor, and whether the father relinquished his right in favour of his sons, or the sons took possession without his consent. But whether the property be ancestral or self-acquired, if the father have not relinquished his title by gift or other alienation, and have merely permitted his sons to enjoy it, in this case he is competent to disturb their possession. Supposing the property to have devolved on the father by right of inheritance, and the father to have reserved his proper share, (that is, a double share of a son,) and to have divided the remainder among his sons, the father is not entitled to claim the property so divided; and if the father, without reserving his share, or reserving a small portion, have divided his patrimony among his sons, he is competent to have his share from his sons, even though the division was made by him voluntarily. If the property was self-acquired, and he distributed it among his sons, with or without reserving a portion, and subsequently the share reserved be expended or lost, in this case, the father is competent to take back the property from the sons, conformably to a text of *Harita* cited in the *Dáyabhága:* "A father during his life, distributing his property, may retire to the forest, or enter into the order suitable to an aged man; or he may remain at home, having distributed small allotments, and keeping a greater portion. Should he become indigent, he may take back from them." The author of the *Vivádabhangárnava* gives the following explanation of the text cited.

"But when a father, wearied by the mutual contests of his sons, in regard to the fruition of the estate, divides the estate among them, and resides at home, determining, 'I will live apart, reserving a sufficient portion for myself;' then the legislator says, 'He may divide a small part among his sons; and they may gain other property and support themselves; but the father being old, and of course unable to labour, may reserve a considerable sum, sufficient for his own support and for religious purposes, and may *thus* reside at home. However, he must practise no frauds.' But if, in consequence of any accident, his wants cannot be supplied out of the property reserved, however considerable it might have been, then the lawgiver declares, 'Should he lose what he reserved, he may take back from them,

CASE VII.

Q. A merchant died, leaving three sons, who succeeded jointly to the property of their father, and continued to carry on his mercantile concerns. The eldest of these brothers also died, and was succeeded by a son, who remained as a partner in the business with his uncles, and he died childless, leaving a widow. Under these circumstances, is the widow entitled to a share of the property held in coparcenary by her husband and his uncles, or merely to subsistence; and if the former, is she entitled to her husband's share, or less than that?

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namely from his sons, what he gave.' The reason is, that no duty is more strictly incumbent on sons and the rest, than veneration of parents: and, if the purpose cannot be fulfilled even with the whole of the wealth acquired *and distributed* by the father, they must even give wealth acquired by themselves."

Moreover, the sons have no property, and cannot seek independency while their father exists, as *Menu* says: "Three persons, a wife, a son, and a slave, are declared by law to have *in general* no wealth exclusively their own: the wealth which they may earn is *regularly* acquired for the man to whom they belong."

Under these circumstances, the father is not only entitled to obtain maintenance from his sons, although the property be acquired by the sons, but he may take a share of it, whether the acquisition was made with or without the personal labour or pecuniary aid of the father, as will appear from the following texts of the *Dáyabhága*.

"Thus the father has a double share, even of wealth acquired by his own son. For the expression is general: 'Let him reserve two shares;' or 'he may take two shares.' *Catyáyana* declares it very explicitly: 'A father takes either a double share, or a moiety, of his son's acquisition of wealth; and a mother also, if the father be deceased, is entitled to an equal portion with the son.' The meaning of this passage is, that the father has a right to take either a double share or a moiety of his son's acquired wealth."

The general rule is, that "the father has a moiety of the goods acquired by his son, at the charge of his estate; the son who made the acquisition has two shares, and the rest take one a piece. But if the father's estate have not been used, he has two shares; the acquirer, as many; and the rest are excluded from participation."

According to the law as current in Benares, the widow of a nephew is entitled to maintenance only from his uncles with whom he was in partnership.

R. Supposing the merchant to have died leaving three sons, and they to have carried on in coparcenary his commercial concerns, and the elder of them to have died leaving a son, who also died leaving a widow, while the property was undivided; in this case, the widow has no title to her husband's share, but she is entitled to her maintenance, as declared by a text: "To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food and old garments which are not tattered*."

Boudháyana, after premising, "A woman is entitled," proceeds, "not to the heritage; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit."

Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except his wife's separate property."—*Náreda.*

Patna Court of Appeal, *May 8th,* 1811.

Mussummaut Chourasee, pauper, *v.* Kurmoo Bhukut and another.

CASE VIII.

A widow whose husband died before his father has a legal claim to maintenance only.

Q. There were six brothers, four of whom were by the same mother. They lived together with their father as a joint family, and one of the four uterine brothers (the second) died before his father, leaving a widow nine years old. Of the three surviving brothers of the whole blood, the eldest acquired some property moveable and immoveable, with his separate funds and exclusive labour. The widow of the second brother now claims one-fourth of her late husband's eldest brother's acquisitions, and the share

* *Sancha.*

of his ancestral property. In this case, is such widow entitled to a share in the property claimed?

R. Under the circumstances stated, the widow has no right to claim any share of her husband's ancestral property, or of his brother's acquisitions, but she must be maintained by the heirs and representatives of her father-in-law. This opinion is conformable to the *Dáyabhága.*

Calcutta Court of Appeal, December 4th, 1821.

CASE IX.

A woman cannot inherit immediately from her step-son, but she is entitled to maintenance from his heir.

Q. A man dies, leaving some landed property, and two sons him surviving. Previously to the partition of the estate, one of the sons dies, leaving a widow and two sons by different mothers. Subsequently to the death of the second deceased, his two sons died, leaving the property in a joint and undivided state. In this case, is the widow entitled to the whole of the estate of which her deceased husband died seized?

R. The widow, on the death of her son, becomes entitled to her son's share. He and the son by a contemporary wife were sole proprietors of her husband's estate; but she has no title to succeed to her step-son, whose portion devolves on his heirs, unless the step-son died before her own son. In this case, she succeeds to the whole of the property; otherwise, she is entitled only to her maintenance, from the person who inherits the share left by the son of the contemporary wife.

Zillah 24-Pergunnahs.

CASE X.

Q. A person died, leaving two sons by one wife (who died before him), and a widow and her two daughters, and

A son, on succeeding to his father's estate, must maintain his step-mother and her daughters.

subsequently to his death one of the sons died. There are now surviving a son of his first wife, and a widow and her two danghters; and supposing the widow to have received no portion of the property from her step-son, in this case, is she entitled to any share of the estate; and if so, what is the extent of her right?

R. The widow is only entitled to a proper maintenance from her step-son; and if her two daughters have not been disposed of in marriage, they will also have some share of their father's wealth to defray their nuptial expenses. Should they, after marriage, be in want of maintenance, in consequence of their husbands' inability to support them, they must be provided with food and raiment by their half-brother. This is conformable to the *Dáyabhága* and other authorities.

Zillah 24-Pergunnahs, January 24th, 1818.

CASE XI.

Q. A widow instituted a suit against her father-in-law and her husband's younger brother, setting forth, that her said father-in-law had some acquired ancestral landed property, and that he had two sons, the elder being her deceased husband, and the younger her deceased husband's full brother; that her husband died before his father and brother, leaving her and her two daughters, one of whom is since dead, but is survived by three minors' sons, and that she claims only sixty rupees *per annum* due on account of her proper maintenance, at the rate of five rupees *per mensem.* In this case, is the widow, whose husband died before his father and brother, competent to bring an action against her father-in-law and brother-in-law for her maintenance? Supposing the plaintiff's husband to have been separated from his father and brother during his lifetime, in this case

is the widow competent to claim her maintenance from the individuals above mentioned?

R. A son dying before his father, his widow living virtuously and obediently to her husband's family, is entitled to obtain maintenance from her father-in-law or other successor to his property; but if her husband have received his share from his father, and been separated from him, she cannot in that case claim maintenance as against him or his heir. This opinion is consonant to the *Vivádárnavasetu* and other authorities.

The widow of a separated brother is not entitled to maintenance from her late husband's family.

Zillah Beerbhoom,
August 14*th*, 1823.

Kumulmuni Dasee, *v.* Bodhnarain Mujmooadar and another.

CASE XII.

Q. A *Rajpoot* died, leaving a widow and a concubine of the *Aheer* tribe, by whom he had four sons; and on his death, his widow performed all the exequial ceremonies necessary on the occasion. In this case, are the sons and their mother entitled to any portion of the property left by the deceased owner; and if so, to what proportion is each of the survivors entitled?

The illegitimate son of a person belonging to one of the regenerate tribes is entitled to maintenance only.

R. Under the circumstances stated, the entire property left by the deceased, excepting such ornaments and clothes as were worn by the concubine and her sons, will devolve on the widow. The concubine and her sons have no right to share such property, but they are entitled to maintenance. This opinion is conformable to *Menu*, the *Mitácshará*, *Vivádaratnácara*, *Vivádachintámani*, and other authorities.

Authorities.

The text of *Vrihaspati*, cited in the *Vivádaratnácara* and other authorities: "The virtuous and obedient son

born of a *Sudra* woman unto a man who leaves no *legitimate* offspring, shall take a *provision for his* maintenance, and the kinsmen shall inherit the remainder of the estate."

"This relates to the son of a woman not lawfully married." The *Vivádaratnácara* and *Vivádachintámani.*

"Even a son begotten by a *Sudra* on a female slave, may take a share by the father's choice." "From the mention of a *Sudra* in this place, it follows that the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance." *Mitácshará. Gotama:* "A son by a *Sudra* woman, born unto a man who leaves no *legitimate* offspring, shall, if he be strictly obedient like a pupil, receive a provision for his maintenance."

"The son begotten on a *Sudra* woman not lawfully married, by a man belonging to one of the three first classes, who leaves no son by a woman of a twice-born class, shall receive a provision for his maintenance, that is, some trifle, as a stock whereon he may earn a livelihood by agriculture or the like. The *Vivádaratnácara.*

Zillah Bhaugulpore,
July 17*th*, 1824.

CHAPTER III.

OF WOMAN'S PROPERTY.

CASE I.

Q. A woman having purchased some landed property with her own funds, died leaving sons and a grandson, whose father died before her. In this case, will the whole property left by her devolve on her sons, or has the grandson any right to share it with his uncles?

A woman's property goes to her sons, to the exclusion of her grandson, whose father died before her.

R. Under the circumstances above stated, the sons of the deceased woman are entitled to her entire estate which had been acquired by herself. The grandson whose father previously died has no right of inheritance. Should there be any maiden daughter, a small portion must be given to defray her nuptial expenses*.

Authorities.

Menu:—"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate."

Dacca Court of Appeal, May 21st, 1811.

Raghunundana Surma, *v.* Gopeenauth Bhuttacharjya and others.

CASE II.

Q. Should a woman of any of the four classes receive jewels as a nuptial donation (technically termed *yautaca*)

* It appears that the property in this case, though acquired by the woman, was not of the nature termed her *stridhun* or *peculium,* and the descent of it was consequently not governed by the rules applicable to that species of property. Had this been the case, the daughter would have been a coheir with the sons.

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at the time of her marriage, do all such ornaments so received, belong exclusively to her, or have her husband's mother and younger brother any legal right to share them with her?

Personal property given to a woman at the time of her marriage becomes hers exclusively.

R. A gift of ornaments or other effects to a woman of any one of the four classes at the time of her marriage, by a member of the family, either of her husband or her parents, or by a stranger, is by law termed *Adhya agnee Stridhun,* or in other words, the woman's peculiar property bestowed before the nuptial fire. It becomes her exclusive property, and the husband's mother or other persons have no right to share it with her. The authorities for this doctrine will be found in the *Dáyabhága, Dáyatatwa, Vivádachintámani, Mitácshará,* and other works of law.

Catyáyana :—"What is given to women at the time of their marriage, near the nuptial fire, is celebrated by the wise as the women's peculiar property bestowed before the nuptial fire."

Náreda:—"What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property."

Menu and *Vishnu*:—"Such ornamental apparel as women wear during the lives of their husbands, the heirs of those husbands shall not divide among themselves; they who divide it among themselves, fall deep *into sin.*"

Catyáyana again :—"Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it, or bestow it."

City of Dacca,
April 21st, 1817.

CASE III.

Q. A person had five sons, two of whom died before him. Subsequently to his death, his surviving three sons equally shared the property left by him. One of the sons died, leaving a widow and a maiden daughter: the widow having succeeded him, disposed of the daughter in marriage, and bestowed a part of her husband's landed estate on the daughter and son-in-law, and some time after she gave the remaining property to them. Under these circumstances, are the gifts legal? If the gifts in favour of the daughter only are good and valid, and on the death of the daughter, her husband and her paternal grandfather's daughter's son be living, which of these survivors will succeed her? Should the daughter have disposed of a portion of the property by gift, though her husband was living, in this case, is the gift complete and binding, or otherwise?

A widow cannot dispose of the whole estate which had devolved on her at her husband's death; and on the death of her daughter who succeeded her, it will go to her paternal grandfather's daughter's son, to the exclusion of her husband.

R. It is recorded in various legal authorities, that a widow is incompetent to make a gift of her husband's whole immoveable estate which devolved on her by inheritance, although she may, under certain circumstances, give a small portion of it. In this case, the widow disposed of her husband's entire landed estate by two gifts, consequently the donation is null and void. On the death of the widow, the succession should have devolved on her daughter, on whose death the property which she inherited from her mother should go to her paternal grandfather's daughter's son, her husband having no right to inherit it. If the daughter have disposed of a small portion only of the estate by gift, it may be considered legal. This is conformable to the *Dáyabhága.*

Zillah Rajeshahye,
May 21*st*, 1813.

CASE IV.

Of property assigned to their sister as maintenance by three brothers, one third will on her death go to her brother's widow.

Q. Three brothers, at the time of the partition of their patrimony, assigned a certain portion of land for the maintenance of their sister. The youngest brother died, leaving a widow; then the second, without male issue; and lastly the eldest, leaving a son. On the sister's death, what portion of the property assigned to her will the widow of the youngest brother, whose grandson in the female line is living, be entitled to?

R. If the brothers assigned the property, on condition that the sister should only enjoy the rents and profits thereof during her life, and that after her death it should devolve on them, in such case one-third of the property will be inherited by the widow of the youngest brother, in virtue of her husband's legal share*.

Zillah 24-Pergunnahs.

CASE V.

Property inherited by a grandmother goes on her death to her husband's daughter's son, to the exclusion of his brother's son.

Q. A person died, leaving his mother, a son, and a widow him surviving; and on the death of his son and widow, his mother took possession of, and enjoyed the property left by them; subsequently the mother died. The original proprietor's father had another wife, by whom he had a daughter, who died leaving a son. On the death of his mother, the daughter's son of her rival wife and her husband's brother's son claim the property. In this case, which of the two is entitled to the succession?

R. The son of the original proprietor having succeeded his father, and having died leaving no heir down

* Although a brother's widow (the brother being dead at the time the property devolved) is not by law an heir, yet this opinion proceeds upon the principle, that the property never had been actually transferred from the brothers, but merely lent, as it were, to the sister.

to the paternal grandfather, the widow of that ancestor should have inherited from her grandson; and on her death, her husband's daughter's son is alone entitled to the heritage, to the entire exclusion of his brother's son*.

CASE VI.

Property devolved on a woman from her sons goes at her death to the son of her husband by another wife, and not to her daughter's sons.

Q. A woman having lawfully obtained a title to, and possessed herself of the estate of her sons, who died without issue, dies, leaving a daughter, who is mother of male issue, (two grandsons in the female line,) and a son's son of a rival wife. In this case, on whom does the right of succession to the estate devolve; and among these individuals, with whom does it rest to offer the oblations to the deceased woman? Is that person, whosoever it may be, who according to law becomes the giver of the funeral cake, entitled, in virtue thereof, to any portion of the estate she left?

R. Under the circumstances above stated, the entire estate, which the deceased woman enjoyed in succession to her sons, will devolve on the son's son of a rival wife. Her daughter and daughter's sons have no title to it, the law only admitting her (the mother's) life interest. The daughter is considered a giver of a funeral oblation, but she thereby becomes heir to her mother's separate property only.

Zillah 24-Pergunnahs,
January 17th, 1817.

* This case merely tends to show that the right of the sister's son is superior (even though she be only a half sister) to that of the paternal uncle's son, according to the law of Bengal, as applicable to which province this opinion was of course given. But the case is inserted under this head, to show that property devolving on a grandmother by right of inheritance is not her *peculium* or *stridhun*, any more than that which devolves on a mother or widow, and that, as in those cases, it goes, on her death, to the heirs of the party from whom she derived it, and not to her own heirs.

CASE VII.

Divorce on account of adultery does not subject the woman to the loss of her peculiar property.

Q. On the death of an individual, his widow contracts a second marriage. The widow formerly had received some jewels from her parents, and her second husband chastised her for adultery, and divorced her. In this case, is the husband legally competent to punish his wife, and to divorce her? If so, does the woman become sole proprietor of the property given to her by her parents and former husband?

R. The husband is at liberty to divorce his wife who violates his bed; but the adulteress is entitled to her parents' and former husband's gift of jewels*.

Zillah Midnapore,
May 15*th*, 1807.

CASE VIII.

Q. A Hindu, on the marriage of his daughter, gave her one *beegah* of land as *(yautaca)* peculiar property, which she enjoyed during her lifetime. She was survived by a daughter and son, the latter of whom took and retained possession of the property. Before his death, he gave the land in question to a stranger, his sister's son being then living: after his death, it did not clearly appear who had performed his funeral obsequies. Under these circumstances, was the alienation by the son valid?

The daughter or her heir inherits the mother's peculiar property, in preference to the son.

R. The property in question belonged of right to the daughter of the original donee; and her son having no proprietary right in the same, any alienation of the property by him was invalid.

Moorshedabad,
Court of Appeal.
Gourenauth, *v.* Koonj Madhub.

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* In the *Cali*, or present age, according to the Hindu law, the marriage of a widow is forbidden; but this practice is prevalent among the inferior classes.

CASE IX.

Q. A *Sudra* woman succeeded by the law of inheritance to two houses acquired by her father. After her marriage, her husband was in possession of the houses, inasmuch as they were their place of residence. The husband executed a deed of sale fór the houses in question to a third person. The wife, however, remained in possession of them. Under these circumstances, was the husband competent to make the alienation in question?

The estate of a woman does not, by her marriage, vest in her husband.

R. The husband was not competent to aliene the houses inherited by his wife, and the sale by him was consequently wholly invalid, as marriage does not confer on the husband any right to dispose of a paternal estate to which his wife had succeeded before marriage.

City of Moorshedabad.

Manickchand, *versus* Chotee Lal.

CHAPTER IV.

OF EXCLUSION FROM INHERITANCE.

CASE I.

Q. A leper had two sons, one of whom is also afflicted with leprosy, but he has a son who is free from disease. In this case, has the son who is afflicted with leprosy any right to share his father's self-acquired property with his brother?

A leper is incompetent to inherit.

R. According to law, the son who is afflicted with leprosy has no title to inherit his father's property.

Yájnyawalcya says: "An impotent person, an outcast, and his issue, one lame, a madman, an ideot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified), must be maintained; excluding them, however, from participation. But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects."

Náreda declares: "One afflicted with an obstinate or an agonizing disease, and one insane, blind, or lame, from his birth, must be maintained by the family; but their sons may take the shares *of their parents.*

Zillah Sarun,
December 12th, 1809.

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CASE II.

Q. Does the right of succession which an insane person would have had to his father, provided he had been of sound mind, devolve on his mother or on his wife? And supposing such insane person to have had a son, born subsequently to the death of his (the insane's) father, which son is since dead; in this case, was the grandson entitled to inherit immediately from his grandfather by reason of his father's insanity; and if so, on his death, has his mother any title to succeed him?

An insane person is excluded from inheritance; and on the death of his son, his wife will take the property, maintaining her husband and his mother.

R. The insane person's wife has no title to inherit from her father-in-law. The widow of the original proprietor excludes her daughter-in-law; but the insane person and his wife must be provided by her with the necessaries of life out of the estate. If, however, after the death of the grandfather, a son of the insane person have been born, and subsequently die, the original proprietor's daughter-in-law will, as mother of the child, take the heritage in succession to her child, and supply food and raiment to her mother-in-law and husband. This doctrine is contained in the *Dáyabhága* and other authorities.

Zillah 24-Pergunnahs,
July 12th, 1812.

Ooma Dibya, *v.* Rammuni Dibya.

CASE III.

Q. A person dies, leaving a widow, and two sons of his brother; the widow is living, but has quitted the order of a housekeeper, and retired from the world. She had not executed any deed either of gift or sale in favour of her husband's nephews. In this case, are they entitled to the property, by reason of the extinction of her temporal affections?

R. If the widow have really relinquished her right to her husband's property, and quitted the order of a householder, her husband's brother's sons become entitled to the property left by her, notwithstanding the fact of her not having made any provision in their favour*.

Retirement from the world operates as natural death.

City of Dacca,
June 16th, 1823.

CASE IV.

Q. 1. A person of the Hindu persuasion having become a convert to the Moohummudan faith, on whom will the property which descended to him from his forefathers, and that which he himself acquired, devolve?

R. 1. Whatever property he, previously to his conversion, was possessed and seized of, will devolve on his nearest of kin who professed the Hindu religion; and whatever he acquired subsequently to his conversion, will go to the person who, according to the Moohummudan law, becomes his legal heir.

In the case of apostacy from the Hindu faith, property acquired before the conversion will go to the Hindu heirs; but that acquired subsequently, will be distributed according to the law of the new religion.

Authorities.

Menu:—" All those brothers who are addicted to vice, lose their title to the inheritance."

Sancha says:—" The heritable right of one who has been expelled from society, and his competence to offer food and libations of water, are extinct."

There is no authority which enjoins that the children by a Moohummudan woman should be permitted to inherit from their putative father.

* Retirement from the world is, according to the Hindu law, a species of civil death, on which, as in the case of natural dissolution, the rights of the heirs immediately begin to exist.

"But *Bhrigu* declared, that whatever customary law of a country, a class or tribe, a company of *merchants and the like*, or of a town, should be alleged and proved, the distribution of an inheritance must be respectively made according to that custom*."

Q. 2. A Hindu had two sons, whom he disposed of in marriage to their equals in tribe, rank of life, and condition. The eldest son had a son by his Hindu wife, and subsequently both the brothers became converts to the Moohummudan faith; but the son of the eldest brother and the wife of the second continued to profess their own religion. After conversion, one of the sons (the second) died. Now there are three claimants to his estate, namely, his nephew, his Hindu widow, and his Moohummudan widow. In this case, will the property which he possessed previously to his conversion, devolve on his Hindu widow or on his nephew ?

And a Moosulmaun widow of such apostate Hindu will have no right to his previously acquired property.

R. Under the circumstances above stated, if a partition of the estate had been made by the sons of the original proprietor, and they lived apart, the Hindu widow is entitled to the inheritance; and supposing them to have lived together as a joint and undivided family after their conversion, the nephew should be declared entitled to the succession.

Authorities.

"The wife, &c." *Dáyabhága*, page 160.
Patna Court of Appeal.

CASE V.

Q. 1. Can a daughter who lives in a state of prostitution take her parents property' by right of inheritance?

* *Catyáyana.* See Digest, vol. iv. page 77.

R. 1. A daughter who has given herself up to prostitution, or one who is unchaste, is wholly incompetent to inherit the property left by her parents.

An unchaste daughter is excluded from the inheritance.

Q. 2. Supposing that there be no other legal representative of her parents than the unchaste daughter, in this case, does the law admit her as an heir; if not, on whom will the property devolve?

R. 2. She is not entitled to inherit her parents' property, even though there be no person to claim the inheritance. The person who is next in order of succession, if there be any such, shall inherit from her parents; and in default of such heir, (the parents not being of the Brahminical class,) their property will escheat to the king*.

And the property will escheat, if there be no other heir.

Zillah 24-Pergunnahs,
February 28th, 1810.

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* It will be seen from the above specimens, that questions connected with loss of caste, and consequent privation of the right of inheritance, are not by any means frequently litigated. I do not recollect having met with any others. Were these disqualifying provisions indeed rigidly enforced, it may be apprehended that but very few individuals would be found competent to inherit property, as there is hardly an offence in jurisprudence, or a disease in nosology, that may not be comprehended in some one or other of the classes. A cursory inspection of the subjoined catalogue of disqualifications will suffice to verify this assertion.

According to the Hindu law, an impotent person, one born blind, one born deaf or dumb, or an ideot, or mad, or lame, one who has lost a sense or limb, a leper, one afflicted with obstinate or agonising diseases, one afflicted with an incurable disease, an outcast, the offspring of an outcast, one who has been formally degraded, one who has been expelled from society, a professed enemy to his father, an apostate, a person wearing the token of religious mendicity, a son of a woman married in irregular order, one who illegally acquires wealth, one incapable of transacting business, one who is addicted to vice, one destitute of virtue, a son who has no sacred knowledge, nor courage, nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, one who neglects his duties,

one who is immersed in vice, and the sons whose affiliation is prohibited in the present age, are incompetent to share the heritage; but these persons, excepting the outcast and his offspring, are entitled to a suitable provision of food, raiment, and habitation. If their disqualifications be removed subsequently to partition, by medicine or other means, they must have their shares from their co-heirs, according to the same rule as that which authorizes a son born after separation to share the property. The individuals above mentioned are differently defined by several authors; some of the particulars of which have been subjoined.

If the sons of the individuals above mentioned be faultless, or free from similar defects, they must have such share as would have belonged to their father, had he been capable of inheriting. The daughters* of these persons must be supplied with food and raiment until married, and the expenses attendant on their nuptials must also be defrayed out of the estate; and their virtuous widows, being destitute of male issue, must be maintained until death.

Class 1. It is laid down in the *Smritiratnavali*, that "according to the doctrine of the *Cámatantra*, the impotent (*Cliva*) is of twenty species," but the definitions of them are not given in that work. Six sorts of *Clivas* are distinguished by *Devala*, as follows:— "The impotents are divided into six heads, namely, *Shándáca, Vátaja Shándá, Pánda, Cliva, Napunsaca,* and *Kilaca.*" He also explains the terms†.

Class 2. According to the best authorities of Hindu law, one who is blind or deaf forfeits his right of succession, provided the blindness or deafness arose from the day of birth; that is, one who was born blind or born deaf, but not whose disqualification arose subsequently to his birth, by disease or similar causes.

Class 3. *Jimútavahana* says: "One who is incapable of articulating sounds, is dumb." *Rámnátha* explains it, "One who is deprived of speech." *Mádhavácharjya* and others maintain, that "Ideot and dumb" is a compound term. The author of the *Vivádachandra* interprets it, "One who becomes dumb, through ideotism."

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* It is not distinctly stated in the *Dáyabhága*, *Mitácshará*, or other works, whether the daughter of an outcast is entitled to maintenance or otherwise; but the author of the *Vivádatandava* expressly declares, that the daughter of an outcast must be maintained.

† The explanations have been given with the most scrupulous attention to minutiæ; but the detail would not be very interesting, nor indeed could it be rendered in an intelligible manner, consistently with delicacy.

CLASS 4. The term "ideot" is explained by *Jimútavahana*, "a person not susceptible of instruction." *Raghunandana*, "One who cannot support the performance of duties." Others explain it, "Void of understanding." *Chandeswara*, "Devoid of knowledge of himself, and one whose intellectual faculties are imbecile." The author of the *Vivádachintámani*, "One who is incapable of discrimination." *Misra*, "One who is incompetent to judge between what is beneficial and mischievous." *Rámnátha*, and the authors of the *Dáyanirnaya*, and other authorities, adopt the construction of *Jimútavahana*. *Vijnyaneswara* explains the term to signify, A person deprived of the internal faculty, meaning one incapable of discriminating.

CLASS 5. According to the doctrine of *Vijnyaneswara*, one affected by any of the various sorts of insanity proceeding from air, bile, or phlegm, from delirium, or from planetary influence, is called mad. The author of the *Dáyabhágavinirnaya* explains the word "mad," One whose mind is imbecile, that is, one who is devoid of the knowledge of determining between what is baneful and what advantageous; but this is rather the state of ideotism.

It is said in the *Vivádabhangárnava*: "One who subsequently becomes insane from the pernicious power of mineral drugs or the like, is not excluded, any more than one who subsequently becomes blind or lame." "Mad:" that is, one who is born mad.

CLASS 6. *Jimútavahana* ordains, "He who cannot walk on either foot, is lame." This reading is copied by the authors of the *Vivádárnavasetu* and *Dáyabhága Vinirnaya*. *Vijnyaneswara* reads differently. "Lame:" deprived of the use of the feet.

It is said in the *Vivádabhangárnava*, that "according to his (*Jimútavahana's*) opinion, if one foot can be used in walking, there is no true lameness. He who cannot walk on both his feet, say modern lawyers, is lame: according to their opinion, if both feet can be used in walking, then only is there no lameness: consequently, a man is called lame, even though he can move on one foot. The opinion of *Jimútavahana* is alone correct; for in the text of *Menu*, the general failure of organs is not signified by the expression, "such as have lost the use of a limb," (literally such as have not their organs:) were that the meaning, one who had only lost the use of his hands, would be capable of inheriting. Logicians do not acknowledge any essential property common to all organs, and peculiar to them; hence a general failure of them *all* cannot be affirmed by a single term; but the general failure of a particular one *may be so affirmed*. That may be the total failure of *power to use* the hands or feet; the total fai-

lure of the sense of smelling or tasting; the deprivation of sight, *which constitutes* blindness; deprivation of hearing, which *constitutes* deafness; the total failure of the generative organs, which is called impotency; dumbness, or the total failure of speech, which depends upon the tongue.

Jagannátha further observes:—" It should be here remarked, that the term " lame," being in juxtaposition to the word blind, must signify born lame. In like manner, " persons deprived of the use of their hands," must signify such as are destitute of the use of both hands from the day of their birth."

CLASS 7. The term " *Nirindriya*," or one who has lost a sense, is derived from *nir* privative, and *indriya*, an organ of sense. The term *Indriya* is explained by some, a sense, as that of smelling, or of sight, &c. but by others a limb, as the hand, foot, and so forth. The first term is expounded by the author of the *Smritiratnávali* as signifying one who has lost a sense, by disease and the like. Lame and the rest: whose hand and foot are lost by disease. The *Vivádatandava*. Lame, and so forth. *Rámanátha*. Some explain the term thus: " One whose generative organ is lost, is called *Nirindriya*, and he is one of those termed impotent." *Vijnyaneswara* explains the term, " Any person who is deprived of an organ (of sense or action) by disease or other cause, is said to have lost that sense or limb." It is said in the *Ratnácara*: " By the mention of *Nirindriya*, or who has lost a sense or limb," persons lame or the like, who are disqualified for acts of religion ordained by revealed and traditional law, are suggested. This explanation is followed in the *Vivádachintámani*, *Vivádabhangárnava*, and other law tracts.

CLASS 8. In the Sanscrit dictionaries, no less than eighteen sorts of leprosy have been enumerated, seven of which are denominated *Mahacushtha*, or great leprosy, and the remaining eleven *C'shudra Cushtha*, or slight leprosy; but according to what may be termed, in this particular, the Hindu medical jurisprudence, there are only eight sorts of leprosy mentioned, as contained in the following passage of the *Bhawishyapuráña* quoted in the *Vivádabhangárnava*: " Hear, O priest, the enumeration of various sorts of leprosy, the last worst than the first: blisters on the feet, a deformity in the generative organs, cutaneous fissures, true elephantiasis, ulcers, coppery blotches, black, and eighthly, white leprosy."

Then follows a long dissertation as to who are competent, and who incompetent, and under what circumstances, to inherit, and the conclusion of the argument is given in the following terms.

"To reconcile the discordant opinions of many wise persons concerning the competence of a leper to inherit, and to perform acts of religion, various modes have been exhibited. But according to both opinions, a man infected with grievous leprosy is in effect capable of inheriting when he has performed penance: according to *Raghunandana* and others, men afflicted with elephantiasis, marasmus, honey-coloured gonorrhœa, black teeth, and other distempers difficultly cured, are incapable of inheritance, so long as penance be unperformed. According to *Váchaspati Bhattáchárjya,* they are capable of inheritance. *Bhavadeva* holds, that a leper who has not performed penance, *is excluded from succession.*"

Class 9. The term "obstinate diseases," is explained to signify atrophy and similar maladies, and the term "agonizing distempers," leprosy and the like. *Ratnácara.*

Class 10. The term "afflicted with an incurable disease" is thus explained by *Vijnyaneswara,* Affected by an irremediable distemper, such as marasmus or the like; and by *Chandeswara,* A hopeless leprosy and the like: the latter is concurred in by the authors of the *Vivádachandra, Vivádabhangárnava, Dáyabhágavinirnaya,* and other authorities. But *Rámanátha* extends the enumeration much farther. "An incurable disease:" Grievous disease, such as leprosy and so forth. The marasmus, strangury, leprosy, gonorrhœa, enlargement of the abdomen from dropsy or flatulency, fistula in ano, piles, and dysentery, are grievous diseases."

Class 11. The term "*patita*" is used to signify a degraded man or an outcast: it is explained in the *Mitácshará,* One guilty of sacrilege or other heinous crime; and in the *Vivádabhángarnava,* One who has done a criminal act. But *Rámanátha* explains it differently, One who is addicted to crimes of the lowest and the highest degree: he also says, that the term outcast must be understood, to signify one degraded, and who is averse from performing the penance.

It is said in the *Vivádabhangárnava,* "One degraded for sin, he who has slain priests, or committed some atrocious crime, and who has not performed penance, but on the contrary is averse from it; for *Raghunundana* says, Aversion from penance on the part of the fallen sinner contributes to the forfeiture of his right to his own property. His not being averse from penance, contributes to his right in the paternal estate. But *Vrihaspati Bhattáchárjya* affirms, that "aversion from penance is no cause of forfeiting his right in his own estate:" according to his opinion, the matter is not in this case regulated by aversion from penance."

CLASS 12. The incompetency of the son of an outcast to inherit his grandfather's property, must be understood of one who was born after his father's degradation; for he (the son) is degraded, being procreated by an outcast. This opinion is conformable to the law as current in all schools.

Balambhatta explains the term "son of an outcast," the son of one who has not performed the requisite penance and expiation.

CLASS 13. The term "*Apápatritá*" is used for "one who has been formally degraded," in the Digest; and "one who has been expelled from society," in the *Dáyabhága;* but both versions are respected. *Jimútavahana* explains the term as it is found in the Digest, Excluded from the joint libation of water, and as in the *Dáyabhága,* A person excluded from drinking water in company. This reading is followed in the *Víramitrodáya,* and by *Sricrishna, Chadamani,* and others. The meaning of the term is thus given in the *Vivádatándava:* "One expelled by his kinsmen, with the ceremony of kicking down a water-pot, for a crime *in the third degree,* such as killing a *Cshetriya* without malice, or the like." And in the *Vyavaharamayúc'ha,* it is defined as signifying, "One who makes a voyage to an island in a ship or the like for traffic, is a sinner in the third degree, conformably to the text, 'a *Dwija**, who goes to sea in a ship, must be taken into company after purifying him,'—and one who is expelled by kicking down a water-pot for killing a *Cshetriya.*" The distinction between this and the tenth class appears to be, that those comprehended in this class have been formally subjected to the ceremony of degradation, and rather on account of *mala prohibita* than of sinful acts.

CLASS 14. The term *Oupapatica* signifies, "one who has been expelled from society." This is the term used by *Jimútavahana, Raghunandana, Maheswara,* and the authors of the *Vivádárnavasetu,* and other works, but they explain it differently. *Raghunandana* explains the term, "one stained with sin of the third degree." So the *Vivádárnavasetu.* It is recorded, that the cutting of trees or the like is a crime of the third degree; but it must be understood that the term means, "one who is tainted with such crimes of the third degree as create incompetency to perform obsequies or other religious rites." The *Dáyacowmudi. Maheswara* expounds it, "one who is addicted to crimes of the third degree, such as attachment to dissolute women,

* The term "*Dwija*" is explained by *Amera,* a man of either of the three first classes, a *Bhahmin,* a *Cshetriya,* or a *Vaisya,* whose investiture with the characteristic string at years of puberty, constitutes religiously and metaphorically their second birth.

and scurrilous acts. But the author of the *Pracása* reads the term *Upapataci*, and adopts *Raghunandana's* explanation. In the *Calpataru* it is read *Apapatrita*. The word is written *Avapataca* in some copies of the *Smritichandricá*, but explained in the same sense.

CLASS 15. The term, "a professed enemy to his father," is, he who assaults and otherwise maltreats his father while he is living, and after his death, is averse from performing his obsequies.—*Raghunandana*, *Misra*, and the authors of the *Vivádárnavasetu*, *Vivádachandrica*, and other works, concur in this construction.

CLASS 16. The term *Pravrajyavasita*, which occurs in the original text, is explained by some commentators, to signify one who has assumed the order of a religious anchoret, and by others an apostate from a religious order; and according to the best authorities, one who has entered into an order of devotion forfeits all right of inheritance, whether he remains in the order of a religious anchoret, or quits it to resume that of a housekeeper.

Balambhatta says, that the orders of devotion are, 1st. that of the professed or perpetual student; 2dly, that of the hermit; 3d. the last order, or that of the ascetic.

CLASS 17. The term "*Lingi*" is explained by *Jimútaváhana*, as a person wearing the token of religious mendicity, and one who has become a religious wanderer, or ascetic; but it is explained by some commentators as intending a fraudulent wearer of sacred marks.

Raghunandana explains it, "one who rigidly practises austerities with an intent to deceive." So do *Chandeswara* and the authors of the *Vivádachintámani*, *Vivádárnavasetu*, *Vivádachandrica*, and other works. But the author of the *Smritichandricá* explains it, "a hypocrite and impostor, or sectary and heretic." It is explained in the *Vyavahára mayúc'ha*, "one who wears a symbol which he is forbidden to wear." *Rámanátha* explains it as signifying *dharma dhwajin*, or one who makes a livelihood by assumed devotion.

CLASS 18. "The son of a woman married in irregular order:" that is, a son begotten by a priest on a young woman of the military or other tribe, married in breach of that order which is prescribed by the law when damsels of various classes are espoused by one man; that son is not capable of inheriting.

"The son of a woman superior in class, but married to a man of a lower tribe, is not capable of inheritance."

Jimútavahana ordains: "If a woman of superior tribe be espoused after marrying one of inferior class, both marriages are contrary to regular order."

Jagannátha says: "He who is born of a woman unequal in rank, but taken in marriage according to the order of the classes, may be heir."

The term "son of a woman married in irregular order," is explained by others, "the son begotten on his wife by a *kinsman legally appointed*, the son of an unmarried girl, and the like." But the author of the *Vivádachandrica* explains it, "a son of a woman married in irregular order."

Nilacántha says: "A woman being married while her elder sister remains unmarried, both the elder and younger sisters are called women married in irregular order."

It is said in the *Vivádachintámani*, that the marriage according to law takes place only with one of the same class; and the woman who is married in breach of that law, is called a woman married in irregular order."

"He is called 'the son of a woman married in irregular order,' whom a person begotten on a woman of unequal rank married in breach of that order which is prescribed by the law when damsels of various classes are espoused by one man. The son of a woman married in irregular order may inherit, provided his mother be equal in class, and the issue born of a woman unequal in rank, but espoused in regular order, may participate." This is *Chandeswara's* exposition, which is concurred in by the authors of the *Vivádabhangárnava*, *Vivádachandrica*, and other authorities. "The son of a woman married in irregular order is unworthy of inheritance; and so is the son of a woman espoused by her kinsmen.'' The *Smritichandrica*. "He who is born of a woman of an equal class, but married in an irregular gradation, and also one begotten on a woman of an unequal class, but espoused regularly, are both excluded from participation." The *Vivádatándava*.

"The son who is born of a woman descended from the same primitive stock *(gotra)* with her husband, is not capable of inheritance." This is the interpretation adopted in the *Vyavahára Mayúc'ha*, *Ratnácara*, *Vivádachintámani*, *Vivádachandricá*, &c. On this subject the *Vivádabhangárnava* contains a long argument, to prove that after consummation the marriage is legal, and concludes with a special distinction, that, "since the marriage of a *Sudra* with a woman sprung from the same primitive stock is authorized, the son born of such marriage is capable of inheriting."

Class 19. In the original text, declaring the incompetency of a person who illegally acquires wealth to inherit, the reading is *adhar-*

menadravyani pratipadayati. The term "*pratipádayati*," (acquires,) is explained in the *Vivádárnavasetu* and other works, as signifying "*Arjjáyati*," earns; but others explain it (*vyati*,) dissipates. *Maheswara Tarcálancara* expounds it, "gives to harlots."

The term "illegally" is explained by *Chandeswara* and *Jagannátha*, to mean, By gambling and the like; and By stealing, according to the *Vivádárnavasetu*. It is laid down in the *Ratnácara*, that some hold that "he who dissipates the wealth is capable of inheriting no more than the residue of a share, after deducting so much as has been dissipated by him." But *Jagannátha* states, that so much shall be deducted out of his share as has been expended with no view to the support of the family, to religious duties, and the like.

Class 20. "One incapable of transacting business:" that is, who is ignorant of civil affairs. *Rámanátha*. "Not become capable of civil transactions." *Vijnyaneswara* and others. The author of the *Smritichandricá* explains the term, "Dumb and the like;" and *Jagannátha* holds that the term may be also explained, "Neglecting civil affairs," and solely devoted to religious affairs.

According to the *Rátnacara*, the term means those not become capable of civil transactions; who should be supplied out of their allotments committed to kinsmen in trust for their use.

Class 21. The term "one who is addicted to vice," is explained by *Jimútaváhana*, "One who is averse from performing his father's obsequies and other acts of religion;" by *Sricrishna*, "One who acts in such a manner as to disqualify himself from the performance of exequial rites," such as cohabiting with a woman whom the law forbids to approach. *Chandeswara* explains the term, devoted to gaming or the like; and they who are disqualified for acts of religion ordained by law, are suggested by the term addicted to vice, and incompetent to share the inheritance; and according to *Cullucabhatta*, in commenting on this passage, those brethren who are addicted to vice, such as gambling, whoring, and the like, cannot inherit, even though they are not degraded.

Class 22. This disqualification seems to be almost of the same nature as the foregoing one. The term "one who is destitute of virtue," is variously explained, One who is tainted with such vices as render him averse to the performance of ancestral obsequies. *Maheswara*. "Tainted with those vices which are the reverse of good qualities." *Raghunandana*. "Corrupted with vicious qualities." *Achyuta*. "One who is averse from performing obsequies and the like." The *Calpataru*. "One who is destitute of such qualities as may be

beneficial to his father in this and the next world." The *Smritichandrica.*

CLASS 23. It is said in a text of *Vrihaspati:* "A son who has no sacred knowledge, nor courage, nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, must be considered as similar to urine and ordure." Upon which *Jagannátha* remarks, that sacred knowledge, courage, and industry, "severally relate to the three first classes:" "devotion" and the rest, concern all tribes." "Immemorial good customs:" the term may be explained, "The practice of virtue to the utmost of his power." It follows, therefore, that a son, even though free from vice, who neglects to fulfill prescribed duties to the utmost of his power, is excluded from participation.

CLASS 24. The term "those who neglect their duties," is explained by *Rámanátha*, "Those who are incapable of duties." *Jagannátha* explains it, "Those who are disqualified for acts of religion, such as sacrifice or the like." Thus a similar term is used in the following verse: "Wealth is conferred for the sake of defraying sacrifices; therefore distribute it among honest persons for that purpose, but not among women, ignorant men, or such as neglect their duties." But here it must be observed, that "ignorant" means, unacquainted with the *gáyatri;* not knowing the sense of that prayer. "One who neglects his duties:" one who performs not the ceremonies enjoined at morning and evening, twilight, and at noon, nor other daily acts of religion. The legislator declares an ignorant man, and one who neglects his duties, incompetent to sacrifice: "Him who neglects solemn rites, the ignorant man, one who is afflicted by a grievous malady, and one who acts according to his mere pleasure, the wise have declared impure even until death."

CLASS 25. "Those who are immersed in vice:" that is, those who are continually occupied in *vyasana*, which is defined by *Rámanátha* as follows:—Hunting, gambling, sleeping in the day, calumny, whoring, drinking, dancing, singing, playing (or music), and idle roaming; these ten arise from desire. Depravity, violence, injury, envy, malice, fraud, abuse, and assault; these eight proceed from anger.

The term "*vyasana*" is explained by *Amera*, "Danger or calamity, falling low or erring, vice proceeding from lust or wrath:" consequently the heir must support those who have fallen off from their duty, that is, who are addicted to gambling and the like; and such as are impelled by vice proceeding from lust, that is, addicted to the society of harlots; and those who are impelled by vice proceeding from wrath,

or who always design mischief to others: it follows from the maintenance ordained, that they shall be excluded from participation. *Jagannátha.*

Class 26. According to the Hindu law, the filiation of twelve descriptions of sons, in addition to the son of the body, namely, the son of his wife by a kinsman legally appointed, the son of his appointed daughter, the son given to *him*, the son made or *adopted*, the son of concealed birth, the son rejected, the son of a young woman, the son of a pregnant bride, the son bought, the son by a twice-married woman, the son self-given, and the son by a *Sudra*, was lawful in former ages; but by the law as it exists in the present or *Cali* age, the *Dáttaca* form of adoption is the only form universally recognized as legal. The law as current in the province of *Mithilá*, however, permits the adoption of a son made (*Kurta* or *Kritrimaputra*) The son begotten by a *Sudra* on his slave girl, not married by him, is entitled to participation; and there are other local and peculiar exceptions.

CHAPTER V.

OF PARTITION.



CASE I.

Q. Is a person competent to divide his self-acquired landed property between his two sons by his senior wife, having reserved something out of it for his own maintenance, while his junior wife is pregnant, or while there is a possibility of her bearing children?

A father making a partition among his sons must reserve his legal share, his wife not being past child-bearing.

R. The individual in question is incompetent, without having reserved his legal share, that is, two shares of his wealth, to divide his self-acquisitions, whether real or personal, between his two sons by his elder wife, while his junior wife is pregnant, or while there is a possibility of such wife's bearing children.

Authorities.

"Who acts otherwise than the law permits, has no power in the distribution of the estate."

"They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

"If the sons were separated (from the father) while his wife was pregnant, but not known to be so, the son who is

afterwards born (of that pregnancy) shall receive his share from his brothers*."

Calcutta Court of Appeal.

CASE II.

Q. A *Brahmin,* who was possessed of some consecrated images, rent-free lands, and ancestral and self-acquired lands, had three sons. Previously to his death, he verbally gave the lands and consecrated images to his

* It should not be supposed, that according to the Hindu law as prevalent in Bengal, there is a fixed period for a father's distribution of his own acquired property of whatever description; for the father has exclusive control over his own acquisitions, and he may distribute such property by giving greater, or less, or equal shares to his sons, and may reserve to himself whatever he chooses, whether half, or two shares, or three. His choice alone determines the time of making a partition of his own acquired wealth, and the distribution does not operate to debar a male child born subsequently thereto; for his right still subsists over the paternal estate, as appears from the following passage of the *Dáyabhága*: " If the father, having separated his sons, and having reserved for himself a share according to law, die without being reunited with his sons, then a son who is born after the partition, shall alone take the father's wealth; and that only shall be his allotment. But, if the father die after reuniting himself with some of his sons, that son shall receive his share from the reunited *co-heirs.* If the sons were separated (from the father) while his wife was pregnant, but not known to be so, the son who is afterwards born (of that pregnancy) shall receive his share from his brothers. Not one only, but even many sons, begotten after a partition, shall take exclusively the paternal wealth. " All the wealth which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition." Under the term " all," wealth, however considerable, which is acquired by the father, goes to the son begotten by him after partition." But the followers of the Benares school maintain, that the father is subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor. And in conformity to such opinion it may be held, that a father is incompetent to distribute his self-acquired landed estate until his wife is past child-bearing, though that is not distinctly stated in the *Mitácshará,* in the chapter treating of the right of one born after partition.

eldest son, and the rent-free lands to his other two sons. In this case, is there any necessity for the execution of a document to perfect the verbal gift? In other words, should the father have died without executing a written gift, is each of his sons entitled to an equal share of his property?

An unequal distribution made by a father among his sons of self-acquired or moveable property is valid.

R. In this case, it requires no written instrument to perfect the gift, as far as regards the self-acquired property, and the sons are incompetent to disturb the distribution made by the father, even though there be no document forthcoming. They are entitled, however, equally to share the ancestral lands.

Authorities.

Náreda says:—" For such as have been separated by their father with equal, or less allotments of wealth, that is a distribution: for the father is lord of all."

Yájnyawalcya:—" When the father makes a partition, let him separate his sons according to his pleasure."

" When the father makes a partition, let him separate his sons (from himself) at his pleasure, and either dismiss the eldest with the best share, or (if he choose) all may be equal sharers." *Mitácshará**.

Zillah Júnglemehals,
May 24th, 1811.

* This, it will be observed, was a Bengal case. Had it occurred elsewhere, the opinion would have been different, the law of Benares and other schools not admitting an unequal distribution of real property, though acquired by the father himself. According to the Hindu law, a writing is merely used *in memoriam rei,* and a written instrument is not essential to the validity of any disposition of property.

CASE III.

Q. A father distributed his property among his sons, and subsequently to that distribution he wished to take it back from them. In this case, is the distribution revocable by the father?

A father may resume property made over by him to his sons, should he subsequently become indigent.

R. If the father have divided his self-acquisitions among his sons, and subsequently become indigent, he is competent to take back such property, as is expressly declared by a text of *Harita* cited in the *Vivádachintámani:* "A father during his life distributing his property, may retire to the forest, or enter into the order suitable to an aged man; or he may remain at home, having distributed small allotments, and keeping a greater portion: should he become indigent, he may take it back from them."

Zillah Shahabad,
July 15*th*, 1816.

CASE IV.

Q. 1. A person had three sons, the youngest of whom absconded from his family house, and the father went towards Bindrabun to make inquiry after him. His other two sons remained at home. In this case, is the eldest son competent to exercise proprietary right over the landed and other property? Supposing the eldest in this interval to have adjusted the proportion of his father's share of the joint property by means of arbitration, in this case, is the adjustment complete and binding?

Partition without the father's consent is illegal.

R. 1. In the absence of the father, who proceeded to Bindrabun to inquire after his missing son, the eldest son is competent to manage his assessed lands and his other property, in virtue of which he may exercise proprietary right over it*. But any partition of joint property made by

* It should not be supposed, from the doctrine laid down in this case, that according to the Hindu law it is a settled maxim, that the

means of arbitration without the father's permission, cannot be considered as lawful.

Q. 2. If the father, at the time of his proceeding to Bindrabun, verbally left directions with his eldest son to adjust the dispute regarding his share of the immoveable property held in joint tenancy with his other co-heirs, and he (the eldest son) accordingly did so while he was absent, and the father upon his return be not satisfied with the adjustment, in this case, is such adjustment good and binding?

But, with his consent, binds him, though absent at the time.

R. 2. Supposing the eldest son, in the absence of his father, but with his permission expressed at the time of his proceeding to Bindrabun, to have chosen an arbitrator, and to have received his legal share of the joint property, separated by means of arbitration, such partition of the estate is good and binding, even though the father after his return wish to recede from it.

Q. 3. A person had an only son, who in the absence of his father having chosen an arbitrator, caused a partition of his father's ancestral immoveable property which was held in joint tenancy with his other co-heirs; and the

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eldest son is alone entitled to manage his father's estate, and that the other sons are to be debarred from the management. The law authorizes a capable son, whether he be eldest or youngest, to manage the estate; but if each son claim his share of management, he is competent to do so. A son who is capable may assume the management, with the consent of the rest, during the father's absence, or at his death, as appears from the subjoined extract of the *Dáyabhága:* "Is not the eldest son alone entitled to the estate, on the demise of the *co-heirs*? and not the rest of the brethren? Not so: for the right of the eldest (to take charge of the whole) is pronounced dependant on the will of the rest. Thus *Nareda* says: "Let the eldest brother, by consent, support the rest, like a father; or let a younger brother, who is capable, do so: the property of the family depends on ability. By consent of all, even the youngest brother, being capable, may support the rest. Primogeniture is not a positive rule."

father having returned home dissented from the measure, and shortly after died. The son who caused the partition is still living, and wishes to recede from it. In this case, is he competent to do so, or otherwise?

And without his consent does not bind the son who made it.

R. 3. The partition of the father's joint immoveable and other property made by the award of an arbitrator, during the father's absence, without his express permission, and to which the father after his return did not consent, is illegal; and on the death of the father, if the son who caused it to be made wish to recede, it cannot be considered as good and binding.

Zillah Midnapore,
May 25th, 1818.

CASE V.

Property having been given by a man to his four grandsons, and one of them dying, the son of the deceased is entitled to claim partition from his uncles.

Q. Of four brothers, who had received some property, moveable and immoveable, by gift from their maternal grandfather, the eldest died, leaving a son (the complainant), and then their mother died. Subsequently to her death, two of the surviving three brothers died, one leaving a daughter, who was mother of male issue, and the other a widow, as their heirs. A part of the property is in joint tenancy, and the other portion is separate, and in the exclusive possession of the several individuals specified. The complainant, being the son of the eldest brother, sues for partition of the estate; and the defendant, one of the brothers, admitting the inchoate right of the plaintiff, states, that while he (the defendant) is living, his brother's son cannot have an equal share with him. In this case, is the property a fit subject of partition while one of the four brothers exists, or will the surviving brother be entitled to a superior portion?

R. All the grandsons were equally entitled to the gift of their maternal grandfather; and should one of them die during the lifetime of his mother, leaving a son, his son has

the exclusive right to the property to which his father was entitled, whether divided or undivided. The following is the doctrine in the *Mitácshará, Dáyabhága,* and other books of law. *Vrihaspati:* "All the brethren shall be equal sharers of that which is acquired by them in concert*."

Zillah Hooghly,
April 3d, 1821.

CASE VI.

Q. Two Hindus were living undivided in respect of food, and in joint enjoyment of the produce of their ancestral *talook.* One of them, by means of borrowed money, purchased some lands. In this case is the other individual entitled to participate in the lands so purchased?

R. It appears in this case, that one of the individuals above alluded to, while he and his coparcener were living in the joint possession of their patrimonial real property, and jointly in respect of food, purchased some lands with borrowed money; but it is not distinctly stated whether the debt was contracted, and the purchase was made, with or without the consent of the co-parcener. Supposing the transaction to have happened with the consent of the other partner, then he is entitled to participate, and must pay the debt proportionally; but, on the other hand, if he was no party to the transaction, the purchaser has an exclusive right to the property, and he is alone bound to liquidate the debt.

Land purchased by one coparcener with borrowed money cannot be claimed by another who was not joining in the transaction.

City Dacca,
June 21st, 1810.

CASE VII.

Q. 1. Whether, by reason of the father of the appellants having messed jointly with the grandfather of the

† In *Mitácshará,* page 272.

respondent, at the time he purchased the *zemindaree* and built the house, but without paying any part of the cost, and without there being any joint hereditary funds, the appellants had any claim in law to share in the estate or house?

Property exclusively acquired by one man is not to be shared by his brethren, though messing with him.

R. 1. If the grandfather of the respondent purchased the *zemindaree* singly, with the produce of his separate industry, and without any aid from funds ancestral or paternal, such *zemindaree* is property exclusively his, in which no other can have a right to participate. And if he obtained a *burmotur sunnud* for land in his own name, (which it appears he did,) no one else can participate in it. And supposing him to have built a brick house on ancestral land, with separate funds of his own, even in that case, such house would not be property in which shares might be claimed by any coparceners he might have: coparceners in the land would only have a claim on him for other similar land, equal to their respective shares. Such is the custom, or unwritten law. From the mere circumstance of messing conjointly, copartnership in property does not follow.

And if one build a house on joint land, the others have no share in it, but only a claim for so much land elsewhere.

Q. 2. Supposing them to have a claim, what would be the share of each? and whether, after the lapse of thirty-eight years, during which the respondent's grandfather and father had been in possession, a claim on the part of the appellants, for separate shares, was maintainable?

Prescription is no bar to partition after any length of time, as far as the fourth in descent.

R. 2. Had the appellants been originally entitled to shares, they could have taken them after thirty-eight years, or after any length of time, as far as the fourth in descent.

Authorities.

The text of *Menu* and *Vishnu*, laid down in the *Dáyabhága*: "What a brother has acquired by his labour, with-

out using the patrimony, he need not give up without his assent; for it was gained by his own exertion."

Sancha and *Lichita*:—" There is no division of a house or garden *made by one son for himself,* nor of water-pots, ornaments, utensils *for food and the like,* nor of concubines or clothes, nor of water in *pools or wells,* nor of pasture ground and roads: so *said* the lord of created beings."

Devala:—"Partition of heritage among undivided parceners, and a second partition among divided relatives living together *after reunion,* shall extend to the fourth in descent: this is a settled rule."

Sudder Dewanny Adawlut,
September 4th, 1801.

Khodeeram Serma and Ochubanund Serma, *v.* Tirlochun, a minor (through his guardian Gooroopershad.)

CASE VIII.

Q. The respondent and appellant being uterine brothers, lived jointly till the month of September 1210, B. S. The respondent (the elder brother) had acquired money by acting as *tehsildar* or collector, *ijaradar* or farmer, and the like capacities; and the appellant also had earned money by acting as a *gomashta* or agent, farmer, and in other employments. They purchased landed property, some in the names of other persons, with their acquisitions, while they were living in a joint state in respect of food. There were no documents to shew, with any accuracy, the proportions in which the parties had respectively contributed to the purchase of the lands in question; but it was clearly established, that the proportion contributed by the respondent was much the more considerable. Under these circumstances, will the estates which had been purchased by both the brothers, without the aid of the patrimony, but with that of their own acquisitions, be equally divided among them, or is the elder brother, with whose money the

greater part of the estates was purchased, entitled to any superior share; if so, to how much?

Brothers living jointly are entitled to share their acquisitions to the amount of the funds contributed by them respectively.

R. Property acquired by the appellant, living jointly with his brother, without using the paternal estate, becomes his exclusive property: and that purchased by the respondent, earned under the circumstances stated, becomes his own estate. If the property was purchased with a greater share of the respondent's funds, the less sum being contributed by the appellant, while they were living together, each of them is entitled to share the estate, in proportion to the funds respectively contributed by them to the purchase of the property. Whatever property may be ascertained to have been purchased by each of the parties, each is entitled to, and such portion should be considered the exclusive property of each; but where the proportionate contribution of each may not be determined, there is no rule in the law by which the respective shares to which each is entitled, can be ascertained.

Authorities.

Yájnyawalcya, cited in the *Dáyabhága* and other tracts: "Whatever else is acquired by the coparcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the *coheirs.*" "Shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used." This is laid down in the *Dáyabhága, Dáyaruhasya,* and other authorities. "Or the same meaning may be deduced from reasoning (without the trouble of inferring the origin of the rule from a lost passage of scripture): That which is acquired by a person, belongs exclusively to him, so long as he lives." The *Dáyabhága.*

Sudder Dewanny Adawlut,
May 28th, 1811.

Koshul Chukrawutee, *v.* Radhanath Chukrawutee.

CASE IX.

Q. A person having left his family house, proceeded to a foreign country with his maternal uncle, by whose assistance he obtained a situation there. He acquired some landed property in coparcenary with his uncle above mentioned, by his own labour and exertions, and at the time of his acquiring such property his father was alive. Subsequently to the acquisition of the estate, his father went and lived with him, being joint in the article of food, for a short time; and then he (the father) having returned home, died. After the acquisition, his two brothers also of the whole blood lived with him for some time, but occasionally they dwelt at their own house. While they resided at their brother's, they were joint with respect to food; and while they lived at their own house, their brother (the acquirer) was in the habit of sending them money for their support. Now one of the two brothers claims one-third of his (the acquirer's) property; and in this case, is the claim good and valid?

A man is not obliged to share with his own brethren, (though undivided,) that which he has acquired by his own unassisted means.

R. If the brother (the acquirer) obtained the landed estate by his individual labour, without using the patrimony, his other brothers have no right to his acquisition; as is declared by *Menu*:—" What a brother has acquired by labour or skill, without using the patrimony, he shall not give up without his assent; for it was gained by his own exertion."

Vyása:—" What a man gains by his own ability, without relying on the patrimony, he shall not give up to the coheirs, nor that which is acquired by learning."

Patna Court of Appeal.

Jumeeyut Lal, Pauper, *v.* Huqeequt Rai.

CASE X.

Q. There were two brothers, who during the lifetime of their father, and while they were living together as an united family, purchased some landed property with their respective separate funds, and retained their respective acquisitions severally, not jointly. On the death of the father, his property was shared equally by his two sons. The property in dispute is that which one of the brothers, since deceased, purchased in the name of his son with his wife's money, while his father was alive, and while they were living in a state of union. In this case, is the surviving brother entitled to claim any share of the property so purchased by the deceased?

One brother, though of an united family, has no claim to the property of another, if made by separate funds and labour.

R. Under the circumstances above stated, it does not appear that the property in question was acquired either with the funds or labour of the father or of the surviving brother; consequently the brother, though living in a state of union with the acquirer, has no concern with his acquisition.

Authorities.

The following texts are laid down in the *Dáyabhága* and *Mitácshará:* "What a brother has acquired by his labour without using the patrimony, he need not give up to the coheirs; nor what has been gained by science."

"Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the coheir."

Dacca Court of Appeal,
January 18*th*, 1820.

CASE XI.

Q. Two brothers possessed an eight-anna share of an ancestral dependant *talook,* and lived apart, though the estate continued to be held by them in joint tenancy. The *zemindar* or proprietor of the dependant *talook* seized the whole estate for the arrears due from the other eight-anna share. The elder brother died, leaving a daughter's son by one of his wives, and a widow. The second brother next died, leaving two sons. After the death of the two brothers, the *talook* was still in the *zemindar's* possession. One of the younger brother's sons, and the proprietors of the other eight-anna share, brought an action against the *zemindar* to recover the property in question, while the elder brother's widow was alive; and afterwards settling the matter by compromise with the *zemindar,* were reinstated in the possession of the property, but the whole eight-anna share which belonged to both the brothers, was retained exclusively by the younger brother's sons, who caused the widow of the elder brother to draw up a deed of gift of her husband's share in their favour. It has been proved, that a few days prior to her executing that document, she was in a state of insanity, and that she died eight or nine days after the execution of the deed of gift. Her exequial rites were performed by one of the younger brother's sons. Previously to her making the gift, her husband's grandson in the female line made objections thereto, and presented a petition to the ruling power, setting forth his objections. On the death of the elder brother's widow, his grandson claims his share of the dependant *talook.* In this case is the grandson entitled to any share; if so, to what proportion? Was the widow competent to give away her husband's entire share to his brother's son or not?

One-fourth, over and above his own share

R. Of the eight-anna share of the dependant *talook,* in this case, one moiety belonged to the elder, and the

of a recovered family estate, goes on partition to him who recovered it.

other half to the younger brother; and the *zemindar*, it appears, seized their shares, together with the other eight-anna share, for the rent due from the latter, and the younger brother's son recovered the property. Under these circumstances, a one-anna share out of the four-anna share which appertained to the elder brother will go, on partition of the estate, to the recoverer over and above his own share, and the remaining three-anna share to the grandson. The gift which was made by the widow of the elder brother to her husband's younger brother's son has no validity. This is conformable to the *Dáyabhága* and other authorities.

City Dacca,
June 25th, 1811.

CASE XII.

Q. Three Hindus (being uterine brothers) live as a joint and undivided family, and acquire some property real and personal, without relying on the patrimony. The eldest brother separates himself from his brothers, and takes the whole of the property exclusively, without coming to any division with his brethren. It appears that the acquisitions of the eldest exceeded those of his brothers. Under these circumstances, how should the property be distributed?

The acquirer takes a double share on partition, where ancestral property has been used in making the acquisition.

R. In this case, the three brothers living in a joint state, acquired the property real and personal by their own respective funds, without relying on the patrimony, and therefore each brother is entitled to a share corresponding to the extent of his separate funds applied by him towards the acquisition. If one of them had acquired it, relying on ancestral joint stock, the acquirer shall have twice as much as the rest; in other words, a double share. Should any one acquire property by dint of his own funds without using the common stock, the acquirer takes the whole acquisition. The authority for this opinion is the following

doctrine of *Vyása* and *Yájnyawalcya* laid down in the *Dáyabhága*, &c.

"If the joint stock be used, shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used." "What a man gains by his own ability, without relying on the patrimony, he shall not give up to the coheirs; nor that which is acquired by learning." "Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the coheirs." "The brethren participate in that wealth, which one of them gains by valour or the like, using any common property, either a weapon or a vehicle. To him two shares should be given: but the rest share alike."

City of Dacca,
May 12th, 1817.

CASE XIII.

Q. A boy received some jewels and other articles as *Yautuca** at the time of his *Annaprásuna*†; and his mother having sold those presents, purchased a landed estate with the produce of the sale in his name. In this case, is his other uterine brother entitled to share it with him?

Land purchased for a boy by means of his *Yautuca*, is not liable to partition.

R. Whatever property (whether consisting of ornaments or other effects) is given as *Yautuca* to a boy, that

* The term "*Yautuca*" signifies any thing received at the time of marriage. It is derived from the verb *yu*, to mix, by adding the neuter suffix, as an union of bride and bridegroom takes place at the time of marriage. What is then received is called *Yautuca*; but the term is generally used to signify donations given at the time of each of the *Sanscáras* or ceremonies.

† This is the ceremony of feeding the child with rice, in the sixth or eighth month, or when he has cut his teeth. For an enumeration of the different *Sanscáras*, see note to Colebrooke's Dig. vol. iii. p. 104.

is to say, presented to him at the period of one of his initiatory ceremonies, such gift is his exclusive and absolute property; consequently his uterine brother has no title to share the property which was purchased by his mother with his funds.

Zillah Midnapore,
Nov. 25th, 1817.

CASE XIV.

Q. A person died, leaving four sons, and some self-acquired landed property. After the father's death, his sons lived together as a joint and undivided family, and they each purchased with their respective acquisitions some lands, which they annexed to the original estate. Under such circumstances, are the four brothers entitled to share the whole property equally, or otherwise?

Property acquired by brothers should be distributed among them according to the labour and funds employed by each.

R. The property acquired by the personal labour and funds of each of the brothers, and annexed to the original estate while they, after the death of their father, were living in a state of union, should there be any means of discriminating how much, either of funds or labour, was contributed by each of the brothers, will be distributed among them, according to their respective contributions*. The ancestral property should however be distributed among them equally.

Ramchunder Das, *v.* Gungadhur Mahtee.

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* This however supposes that the funds used for the acquisition had not been derived from the ancestral estate. In that case the rule is, that a double share only goes to the acquiring brother. *Vyása:* "The brethren participate in that wealth which one of them gains by valour or the like, using any common property, either a weapon or a vehicle. To him two shares should be given: but the rest should share alike." Vide the *Dáyabhága*, page 111.

CASE XV.

Q. A person, living with his half-brother as a joint and undivided family, without having come to a separation, proceeded to a foreign country, where he held an official situation, and purchased some landed property. In this case, is the half-brother, from the circumstance of his living in copartnership with the acquirer while the acquisition was made, entitled to any portion of the estate; if so, how will the property be shared between them?

A man has no title to share in acquisitions exclusively made by his unseparated brother.

R. Under the circumstances above stated, according to the doctrine contained in the *Dáyabhága* and other law books, the brother of the half blood has no title to participate in the property, from the circumstance of his continuing with the acquirer as a joint and undivided family when the acquisition was made.

April 17th, 1815.

CASE XVI.

Q. There were five brothers, one of whom, subsequently to the father's death, obtained a rent-free *Mouza* in his own name, and in the name of one of his brothers, and died, leaving the four brothers above alluded to, and a widow. Does the *Mouza* in question belong to all the brothers, or only to those in whose name the grant of it was drawn out?

The acquisition of a man made by his own means alone is not divisible among his brothers.

R. Whenever property, moveable or immoveable, may have been gained by a parcener without detriment to the paternal estate, such acquisition becomes his sole property, and the other brothers have no right to claim it. Should there have been joint labour and joint funds used, the acquisition must be equally divided among the brothers, as declared by *Menu* and *Yájnyawalcya:* " What a man gains by his own ability, without relying on the patrimony,

he shall not give up to the coheirs, nor that which is acquired by learning*."

"Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the coheirs."

CASE XVII.

Q. Of two brothers, who lived together as a joint and undivided family, the elder died, leaving four sons, and the younger brother and his son are still living. On the death of the elder brother, his four sons and the surviving brother and his son separated in respect of food, but the property continued in joint tenancy. Certain landed property was purchased with the proceeds of the joint estate, as well as with money, which was jointly borrowed, by means of the personal exertions of the parties, in the name of the surviving brother's son. The debt so contracted was liquidated by the proceeds of the joint property, and the management of the estate newly purchased was wholly confided to the surviving brother's son. In this case, to what proportions of the property is each of the above individuals entitled?

Acquisitions made by a man jointly with his

R. Supposing one of the two undivided brothers to have died, leaving four sons, and the other brother to be

* A brother (whether he be of the half or whole blood) cannot share the acquisition exclusively made by his brother without the use of the patrimony; but if it were made by the use of joint funds, according to the law as current in Bengal, the acquirer should have twice as much as the rest of his partners: but to any augmentation in the nature of an increment this rule does not apply, and all the brethren share equally. "Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer."—*Mitácshará*, page 275.

living, with a son, and the family to have subsequently separated in respect of food only, and after the elder brother's death, their property to have been undivided, and landed property to have been acquired by means of their joint funds and labour, in the name of the surviving brother's son, and that son to have managed the estate; in this case, the property will be made into two shares, of which one will go to the four sons of the deceased brother, in right of their father, and the remaining one to the surviving brother. The portion which will go to the four sons of the deceased brother will be equally shared by them. This opinion is consonant to the *Dáyabhága, Dáyatatwa,* and other authorities*.

brother's four sons, by means of joint funds, will be divided into two portions, of which one will be taken by the man himself, and the other be shared equally by the four sons of his brother.

Calcutta Court of Appeal,
June 13*th*, 1814.

CASE XVIII.

Q. A man had two sons, the eldest of whom died before his father, leaving two sons, to whom he bequeathed by will certain self-acquired property. The father and three brothers of the deceased severally claim a share of the property so bequeathed. Supposing the deceased to have acquired the property solely by his own funds and personal exertions, in this case, are all the claimants entitled to share such acquisitions; and if so, in what proportions? On the other hand, supposing the property to have been acquired with the aid of the father's funds and labour, in this case too, how will the property be divided among the individuals in question? What is the law as to their right of sharing the property, whether living together or separately in respect of food?

* But it must be understood in this case, that the sons of the deceased brother did not individually contribute any thing to the acquisition. The right they derived was from their father, and in virtue of his contribution.

Property acquired by one of four brothers with the aid of his father's funds and labour, will on partition be made into ten parts, of which five will go to the father, two to the acquirer, and one to each of his brothers: if acquired without any aid, into two parts, the father taking one, and the acquirer one.

R. Of the four brothers, if one (whether he lived jointly with the rest or separately in respect of food) bequeathed his self-acquired property to his two sons, and died before his father; in this case, if the property have been acquired with the aid of the father's funds and personal labour, a moiety of such acquisitions belongs to the father, and the other half will be made into five parts, of which two will go to the acquirer, and one to each of the three brothers. Supposing the property to have been acquired without the aid of the father's funds or labour, in such case the brothers have no right to any share, but the father is entitled to a moiety. In both cases, the acquirer's sons are entitled to the portion to which their father was entitled. This opinion is conformable to the *Dáyabhága, Dáyatattwa,* and other authorities. The text of *Catyáyana* cited in the above authorities: "A father takes either a double share, or a moiety, of his son's acquisition of wealth."

"Here, the father has a moiety of the goods acquired by his son at the charge of his estate; the son who made the acquisition, has two shares; and the rest take one a piece. But, if the father's estate have not been used, he has two shares; the acquirer, as many; and the rest are excluded from participation." The *Dáyabhága.*

Sudder Dewanny Adawlut.

CASE XIX.

Q. A person instituted a suit in the civil court of *zillah* Bhaugulpore, against four individuals, claiming a fifth out of an eight-anna share of a certain village, and the cause was referred to the court of the *sudder ameen* for decision. The plaintiff presented a petition to this court, stating, that the eight-anna share of the above village was jointly purchased by the defendants and the plaintiff's father, (who were brothers of the whole blood;) but that, at the time of purchase, his father was in a state of insanity, and,

he himself was a minor. Under these circumstances, is he entitled, according to the Hindu law, to any share of the property, or otherwise? It should be remembered, that when the property in question was purchased, the plaintiff's father and the defendants held in joint tenancy, though the former was disturbed in mind, and the plaintiff under age; but he (the plaintiff) has now attained the age of majority, and in this case, is he entitled to one-fifth of the property in question or not?

The son of one of five brothers, though his father was insane, is entitled, on partition, to one-fifth of property acquired by joint funds.

R. If one of the five brothers was mad, and all of them lived together as an undivided family, and the four purchased the property in question with the use of the joint funds belonging to all the five brothers, even though the deed of sale have been drawn out in the names of the four sane brothers only; still, if the plaintiff be free from similar defect, as madness, &c. he is entitled, on partition, to one-fifth of the property. But if the property was purchased without the use of the joint funds, he has no right to share. This opinion is conformable to the *Vivádaratnácara, Vivádachintámani, Mitácshará,* and other authorities.

Authorities.

The texts of *Devala,* cited in the *Vivádaratnácara* and other authorities:—" On the death of a father *or other owner of property,* neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an ideot, nor one *born* blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his heritage. For such men, except those degraded, let food and clothes be provided; and let the sons of such as have sons, take the shares of their parents, if themselves have no similar disability."

" 'Disability,' which is a cause of being excluded from inheriting." The *Ratnácara.*

The text of *Catyáyana,* cited in the same authorities:—"On a partition by coheirs, all the wealth left by their father, or by his father, and what they themselves have acquired *by their joint efforts,* shall be divided among them."

"'What they themselves have acquired,' excepting that for which there is a cause of severalty." This being the interpretation of the text in the *Ratnácara.*

"The term 'self-acquired' here means, acquired with the use of the father's funds." The *Vivádachintámani.*

Zillah Bhaugulpore,
July 11*th,* 1821.

CASE XX.

Q. 1. Of three Hindu uterine brothers, living in joint possession of their paternal estate, one acquired a *jageer* or pension in land, and obtained a few villages as a grant from his father-in-law. In this case, will the *jageer* and the villages be shared by all the brothers, or not?

A *jageer* or other grant acquired at the expense of the patrimony, does not belong exclusively to the acquirer.

R. 1. If the *jageer* have been gained at the expense of the patrimony, it must be divided among all the brothers; but if it have been acquired solely by the labour of one brother, without the aid of the paternal estate, in this case, it will not be shared by all the brothers, as it becomes the exclusive property of him who acquired it. So the villages may have been purchased by the father-in-law with his own money, and given by him to his daughter's husband, and in this case they cannot be shared by all the brothers, as *Menu* says: "What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent; for it is gained by his own exertion."

Q. 2. It appears from the reply to the first question, that if the *jageer* was acquired at the expense of the patrimony, all the brothers are entitled to share. Is it implied, by this mention of the use of the paternal estate, that something out of such estate was actually taken, or that the acquirer having been supported at the expense of the ancestral property, had studied science, by means of which he held a situation and obtained the *jageer;* and in either of these cases, will the *jageer* be considered to form part of the paternal estate, and be shared by all the brothers?

Though science should have been the means of acquisition.

Q. 2. According to the Hindu law, any property acquired by an unseparated brother by means of science, which science he was enabled to obtain by assistance from his father's funds, will be participated by his brothers.

Q. 3. Will the *jageer,* in both cases, that is to say, whether it be acquired with the direct use of the patrimony, or through science gained by its means, be shared by the acquirer and his other brothers in equal portions, or in greater or less portions?

The acquirer taking a double share.

R. 3. Under both circumstances, the acquirer is entitled to two shares, and the other brothers to a single share each, as *Vrihaspati* says: " He, among them, who has made an acquisition, may take a double portion of it*."

Patna Court of Appeal,
January 21*st*, 1814.

Aghoree Shewchurnram, *v.* Aghoree Kurtaram and another.

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* According to the law as current in Bengal, an acquirer using joint stock has two shares; but the lawyers whose authorities are current in Benares propound an exception to this maxim, and they ordain an equal division in cases of addition to or improvement of the original property without any separate acquisition, as appears from the following extract from the *Mitácshará:* " Among unseparated bre-

CASE XXI.

Q. Is it necessary, in the case of coparceners separating themselves from each other, and dividing their joint property among themselves, to execute a formal deed of partition ?

The fact of a partition should be recorded.

R. When coparceners separate themselves in respect of food and property from each other, it is proper to execute a deed of partition or release.

Authorities.

"That *record* of partition which brothers, *or other coheirs,* execute after making a just division by mutual consent, is called the written memorial of the distribution*."
Zillah Burdwan.

CASE XXII.

Q. Twenty-five *beegahs* of land situated in one village, and seven *beegahs* in another village, formed the ancestral estate of the three appellants and of the respondent's husband, these four indivduals being descended from the same grandfather. The appellants having lived from the time of the settlement, that is, the year 1197 Fuslee, in the peaceful possession of the twenty-five *beegahs* of land, discharged the

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thren, if the common stock be improved or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer."

* In the case of partition, a release or a deed of partition is the best evidence to ascertain it; but if partition was made by the partners without executing any document, it cannot be set aside by any of them on that ground; as, where doubt arises regarding the fact of a partition, there are several sorts of evidence, the particulars of which are mentioned at length in the following note.

rent due from the estate in their possession as *putteedars* to the proprietor of the village; and the respondent's husband and herself, having done so for the other seven *beegahs* of land, paid the revenue to Government. The appellants are residing in that village in which the twenty-five *beegahs* of land are situated, and the respondent's husband and herself took up their residence in the village in which the seven *beegahs* of land are situated. The appellants brought an action against the respondent, claiming a share of the seven *beegahs* of land, and a judgment for five *beegahs* and five *biswas* of land was passed in their favour. The respondent did not appeal from that decision, but instituted a fresh suit against the appellants, claiming six *beegahs* and five *biswas* of land out of the twenty-five *beegahs* as her husband's legal share, and a decree was passed in her favour. The appellants being dissatisfied with that decision, appealed from it to this court; and it has not been clearly ascertained, that the lands situated in both the villages were formally divided between the appellants and the respondent's husband, agreeably to their respective shares. In this case, is the respondent, according to law, entitled to claim her husband's share out of the twenty-five *beegahs* of land occupied by the appellants, or otherwise?

Partition will be presumed under what circumstances.

R. From the texts of *Yájnyawalcya, Menu, Náreda, Catyáyuna,* and others cited in the *Mitácshará, Veeramitrodaya, Vyavahâramádhava, Vyvahâramayūc'ha,* and other authorities, it would appear, that if the four individuals, being descended from the same grandfather, have not been separated from each other, the widow (the respondent) is only entitled to get her food, raiment, and a house for her residence; but if her husband had been separated from his coparceners, then she is entitled to inherit his property. From its being specified that the rent due from the twenty-five *beegahs* of land was discharged by the appellants, and that

due from the seven *beegahs* of land by the respondent's husband and by herself, it may be inferred, that the respondent's husband lived separated from his coparceners, and discharged the rent due on account of the land in his possession, by reason of a partition of the estate having taken place. It is a rule of law, that if brothers live apart from each other, and partition is alleged to have taken place so long ago, that no writing on the subject or other record can be found, and if it be proved that they for a long time have lived apart, and have been separate with respect to residence and food, the partition will be presumed; and such being the case in this instance, the widow (the respondent) is entitled to her husband's share of the twenty-five *beegahs* of land*.

City Benares,
March 25th, 1816.

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* According to the Hindu law, where a doubt exists regarding the fact of partition having been made, this doubt must be solved by having recourse either to the evidence of kinsmen, relations, and other witnesses, by the record of the distribution, by separate transaction of affairs, by separate household establishments, or the like. The following authorities are extracted from the chapter of the *Dáyatatwa* which treats of dubious partition. *Sancha* ordains: "A doubt having arisen on the question whether a family has been divided or not, and the nearer kinsmen being unable to answer it from their own knowledge, the more distant relations ought to be witnesses."

"Whether a family has been divided or not; on the subject of a distribution of wealth, which has been inherited by a family, and of which a distribution is to be made; and on a doubt whether partition have or have not been made, kinsmen ought to be witnesses: or failure of them, the neighbourhood ought to be the same."

Vrihaspati explains the nature of a written record of partition: "That record of partition which brothers, or other co-heirs, execute after making a just division by mutual consent, is called the written memorial of the distribution."

CASE XXIII.

Q. A person died, leaving four sons, one of whom separated himself from the rest, and the other three lived together. The brother who separated himself, applied for a division

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The following text of *Vrihaspati* is cited in the *Vyavahára-mátrica*: "When a village, a field, and a garden are recorded in the same grant, if any part be occupied, they are all legally possessed."

"Thus on a partition among brothers, whatever village or other land is inserted in a written record of partition, should some part thereof be occupied, and the remainder be not possessed, still the whole land is considered in law as actually possessed, not as property neglected."

Also he says: "In immoveable property obtained by an equitable partition, or by purchase, or inherited from the father, or received from the king, a title is gained by long possession, and lost by silent neglect. Even in property simply obtained, with or without a fair title, which a man has accepted, and quietly possessed unmolested by another, he acquires a title; and in like manner he forfeits one by silent neglect."

By possession, the title over property obtained by an equitable partition, by purchase, and by similar instances, is established, and the silent neglect of the possession constitutes the forfeiture of such property.

Náreda:—"When co-heirs have made a distribution, the acts of giving and receiving cattle, grain, houses, land, household establishments, dressing victuals, religious duties, income, and expenses, are to be considered as separate, and (conversely) as proofs of partition. After separation, but not before it, brothers may become witnesses or sureties for each other, and may reciprocally give and receive, present or make, contracts with each other: but in regard to property separately acquired, they may do so even before partition. Those by whom such acts are publicly done with their separate property, let men consider as divided, even without written evidence."

Consequently *Yájnyawalcya* propounds: "It is declared, that brethren, husband and wife, father and son, cannot become sureties for each other before partition, nor reciprocally lend their joint property, nor give evidence for each other in matters relating to the common stock."

of the government revenue due on his paternal estate, in proportion to the share which had devolved on him by right of inheritance, and the partition of the produce was made in the interim, but no division of the land took place. One of the three brothers who lived undivided in respect of food and the like, died, and his two associated brothers performed his exequial rites with the produce of the landed estate, being the shares of the deceased and their own. In this case, will a third share of the deceased brother's property devolve on the brother who separated himself and lived apart, or otherwise?

Living apart as to food and habitation, is not considered a separation such as to disqualify from inheritance.

R. If of the four brothers of the whole blood, whose paternal moveable property was divided, but whose immoveable estate was undivided, three lived together, of whom one died, and the associated brothers performed his exequial rites with the joint funds, the other brother who lived apart is entitled to one-third of the deceased brother's share of the paternal undivided immoveable property, even though he may not have joined in the performance of his exequial rites. This opinion is conformable to the doctrine laid down in the text of *Menu* and other sages. *Menu:* "When all the debts and wealth have been justly distributed according to law, any property that may afterwards be discovered shall be subject to a similar distribution." *Devala:* "Next let brothers of the whole blood divide the heritage of him who leaves no male issue."

Menu again says: "Should the eldest or youngest of several brothers be deprived of his allotment at the distribution, or should any one of them die, his share shall not be lost: but his uterine brothers and sisters, and such brothers as were reunited after a separation, shall assemble and divide his share equally*."

* This question was circulated to several jurisdictions of the Upper Provinces. Some of the Hindu law officers delivered their opinions, that the brother who lived apart after separation was excluded from

CASE XXIV.

Q. 1. There were three uterine brothers, who during the lifetime of their father caused him to make a partition of his entire estate between them, and from that time one brother lived apart, and the other two lived together as an united family. Subsequently to the father's death, one of the united brothers died, leaving no male issue, and his exequial rites were performed by his united brother. In this case, are the surviving brothers equally entitled to his property; or is the brother who lived in a state of union with the deceased, alone entitled to the succession, to the exclusion of the other brother who lived separated?

If reunion be pleaded after partition, there must be distinct evidence to the fact.

R. 1. The brothers having separated, if one of them die without heirs*, his estate shall be equally shared by his brothers, provided there be no particular evidence of a reunion† having taken place between the deceased and the brother with whom he resided till his death. The doctrines for this are laid down in the *Dáyabhága* and other authorities.

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inheriting his deceased brother's property, by those brethren who lived together with the deceased; and in support of their expositions they quoted the doctrines regarding the right of a reunited co-heir. Others of the law officers stated, that the unassociated brother had an equal right of succession, because, in point of fact, no division of the immoveable ancestral property had taken place, by casting lots or other means, at the time when the brother separated, or subsequently to that separation. The discrepancy would appear to have arisen from its not having been distinctly stated, that there was in reality no division of the property, but merely a separation of persons. Association merely in point of food, or messing together, gives no privilege to the brothers so associated over a brother who messes apart, but whose property continues undivided.

* Here, by the mention of "without heirs," it must be understood, that the person died leaving no heir down to the mother.

† *Jugunnátha* explains the term "reunion" by quoting *Jimutavahana's* interpretation of that term, which is noticed by *Raghunandana,*

Yájnyawalcya:—The wife and the daughters, also both parents, brothers likewise."

Menu:—" Of him who leaves no son, the father shall take the inheritance, or the brothers."

Devala:—" Next let brothers of the whole blood divide the heritage of him who leaves no male issue."

Q. 2. If there be evidence of an express and distinct reunion, and one of the reunited brothers die, is the associated brother alone entitled to his estate, or will the unassociated brother share with him?

A reunited brother entirely excludes an unassociated one.

R. 2. Under the circumstances above stated, the associated brother is alone entitled to the succession, to the entire exclusion of the unassociated brother.

Authorities.

Yájnyawalcya:—" A reunited (brother) shall keep the share of his reunited (co-heir), who is deceased."

Zillah Hooghly.

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the author of the *Dáyatatwa*, as follows : " That they only who may be coparceners by birth, (in respect of property acquired by a father, brother, paternal uncle, and the rest,) having made a partition, are reunited by dwelling together in the same house as joint housekeepers, after annulling the former partition, through mutual affection, by a declaration in this form : 'Thy wealth is mine ; and that which is mine, is thine.' There is no reunion of any other persons, such as partners in trade, by the simple junction of property. vol. iv. page 215.

CHAPTER VI.

OF ADOPTION.

CASE I.

Q. Is an unmarried person competent to adopt a boy as his son, or otherwise?

R. An unmarried person may, for the purpose of securing his own and his ancestor's funeral oblations of food and water, adopt a boy.

An unmarried person may adopt.

This is consonant to the *Dattacachandrica, Dattacadarpana,* and other works.

Zillah Junglemehals,
May 11*th,* 1826.

CASE II.

Q. 1. Is a woman, on the death of her husband, competent to adopt a son or not?

R. 1. If her husband left directions with her to adopt a boy, and then died, in this case, the widow is authorized by law to receive a son in adoption, but not otherwise.

A widow cannot adopt a son without the permission of her late husband.

Authorities.

The text of *Vasistha,* cited in the *Vivádachintámani* and *Vivádabhangárnava* :—" Let not a woman either give or receive a son in adoption, unless with the assent of her husband."

A posthumous son is entitled to inherit his grandfather's property with his uncles, but not a posthumous daughter, who can only take property actually in the possession of her father before his death.

Q. 2. A person died before his father, leaving a widow in a state of pregnancy, who was subsequently delivered of a child. In this case, is the posthumous child entitled to its father's property?

R. 2. If the son leaving a pregnant wife died before his father, while the family were in a state of union, and the widow subsequently bring forth a son, such son, on the death of his grandfather, is entitled to inherit his father's portion along with his uncles or other heirs; but if the widow bring forth a daughter, she cannot claim a share, because there is no provision in the law that a grand-daughter, whose father's death happened previously to that of her father, may inherit from her grandfather. But supposing the original proprietor to have divided his estate between himself and his deceased son, in this case, the grand-daughter is competent to inherit her father's share.

Authorities.

The text of *Catyáyana,* cited in the *Dáyatatwa* :—" Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his *uncle's* son."

Q. 3. Is it customary to enter into any written agreement on the occasion of adopting a boy; and if so, is an adoption in which no writing was executed necessarily null and void?

A written instrument is not necessary to the validity of an adoption.

R. 3. There is no law requiring the execution of a written instrument on the occasion of receiving a boy in adoption, though the practice of resorting to writing is prevalent. If a person, having performed the ceremonies prescribed for adoption, affiliate a boy whose age does not exceed five years, without having recourse to any written

instrument, and the parents of the boy, with their own free will, give the boy for the purpose of affiliation, in such case, the adoption is good and legal.

The passage quoted in the *Vivádárnavasetu* and *Vivádabhangárnava* :—" But after their fifth* year, O king, sons given and the rest must not be adopted: let the adopter

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* It should be here remarked, that the mention of the " fifth year" does not appear to be absolutely restrictive, or intended to fix a limit of age beyond which an adoption would be illegal. The subject has been discussed at considerable length in the following note of Mr. Colebrooke, which is to be found in his translation of the *Mitácshará*. " *Raghunandana* in the *Udváhatatwa*, has quoted a passage from the *Cálica purána*, which with the text of *Vasishtha*, constitutes the groundwork of the law of adoption, as received by his followers. They construe the passage as an unqualified prohibition of the adoption of a youth or child whose age exceeds five years, and especially one whose initiation is advanced beyond the ceremony of tonsure. This is not admitted as a rigid maxim by writers in other schools of law; and the authenticity of the passage itself is contested by some, and particularly by the author of the *Vyavahàramayúc'ha*, who observes truly, that it is wanting in many copies of the *Cálica purána*. Others allowing the text to be genuine, explain it in a sense more consonant to the general practice, which permits the adoption of a relation, if not of a stranger, more advanced both in age, and in progress of initiation. The following version of the passage conforms with the interpretation given of it by *Nanda Pandita* in the *Dattacamimángsá* : ' Sons given and the rest, though sprung from the seed of another, yet being duly initiated by the adoption under his own family name, become sons of the adoptive parent. A son having been regularly initiated under the family name of his natural father, unto the ceremony of tonsure, does not become the son of another man. When indeed the ceremony of tonsure and other rites of initiation are performed by the adopter under his own family name, then only can sons given and the rest be considered as issue: else they are termed slaves. After their fifth year, O king, sons are not to be adopted. But having taken a boy five years old, the adopter should first perform the sacrifice for male issue.' "

take a boy five years old, and first perform a sacrifice for male offspring*."

Zillah Nuddea,
September 20th, 1810. }
Kissenkant Goswamee, *v.* Purmanund Goswamee.

CASE III.

Q. A man had two sons, the eldest of whom died, and subsequently to his death, the father gave his second son for adoption to the brother of his wife. Excepting those sons, he had no other issue; and, in this case, is it legal to adopt such son?

An only son cannot be given in adoption.

R. Under the circumstances above stated, in default of a third son or a son's son, the gift of the second son, after the death of the elder, must be considered as illegal †.

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* And the following is a quotation from the remark of the Sudder Dewanny Adawlut in the case of Kerut Narain, *versus* Bhobinesree, decided in 1806. "A passage cited as an authority of law by the Hindu writers, whose works are current in Bengal, expresses, that after the fifth year, a child should not be adopted by any of the forms of adoption; but that a person desirous of making an adoption, should take a child of an age not exceeding five years. On this passage a question arose, whether the limitation of age was to be understood as positive, and constituting an indispensable requisite to the validity of the adoption, or whether it admitted of any latitude of construction. In other provinces, and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur, as the adoption of a brother's son, or other nearest relation of the husband, would be unquestionably valid at an age much exceeding that specified. But in Bengal, where the adoption of strangers to the family is practised, the settled doctrine is, that the boy's age must be such, that his initiation, the principal ceremony of which is tonsure, may be yet performed in the adopter's name and family."

† According to the general prohibitory rule, "by him who has one son only, the gift of that son is not legal." *Cuvaira Bhatta* says: The gift of a son by a man who has two sons, must not be made; for he, having quoted the text of *Saunaca*, ("By a man having several sons, the gift of a son is to be made, on account of difficulty,") ob-

CASE IV.

Q. Is it allowable, according to the law as current in Behar, to adopt an only son?

An only son cannot be adopted according to the *Dattaca* form.

R. According to the law as current in Behar, the adoption in the *Dattaca* form of an only child is illegal, as the gift and acceptance of an only son are both prohibited, without which formalities a *Dattaca* adoption cannot be carried into effect.

Authorities.

"Let no man give or accept an only son, since he must remain to raise up progeny for the obsequies of ancestors; nor let a woman give or accept a son, unless with the

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serves, that on the death of the other son, the lineage would be extinct. This opinion is concurred in by the authors of the *Vaijayanti* and *Dattacamimangsá*: "By no man, having an only son, is the gift of a son to be ever made." From this expression, the gift by one having two sons, being inferrible: this part of the text ('By one having several sons, &c.') is subjoined, to prohibit the same, by one having two sons also."—It must be here remarked, that the prohibition of giving a son by a father of two sons, does not extend to avoid the gift of a son, made by a person who has a son or a son's son, or two grandsons, in addition to him who is given; for by parity of reasoning, no extinction of the lineage would occur, if in addition to a son, he have a son's son or two grandsons living, as the term "son" means son, son's son, and son's grandson. If this were the construction, it would follow, that a man having a grandson or great-grandson might adopt a son. It will be observed, that the answer is not directly in point. The question was, is it legal to *adopt* a son under such circumstances? and the reply states that, it is illegal under such circumstances to *give away* a son in adoption; but, in fact, the prohibitory injunction applies as well to the giving as to the receiving; the giver of an only son being considered as parting not only with the sole means of evading eternal torment *himself*, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect.

assent of her lord." *Vasishtha*, cited in the *Dattacamimángsá* and *Dattacachandricá*.

Sudder Dewanny Adawlut,
May 14th, 1823.

Nundram and others, *v*. Kashee Pandee and others.

CASE V.

Q. A person previously to his death left directions with his wife, who was then under age, to adopt a son for him while his other brothers were alive. In this case, was he at liberty to desire his wife to adopt a son, though his brothers were living?

A widow being a minor, may adopt a son under instructions from her late husband, though her husband's brothers are living.

R. If the deceased previously to his death, and during the lifetime of his brothers, left directions with his wife to accept a son in adoption, and subsequently died, on his death, the directions so given should be considered legal for the purpose of affiliation. The non-age of his widow and the existence of his brothers are, according to law, no obstacle to the adoption. This opinion is conformable to the doctrines of *Menu*, the *Vyavaháratatwa*, the *Dattacamimángsá*, and other law books.

City Moorshedabad,
March 19th, 1815.

Haradhun Rai, agent of Surbamungula, *v*. Biswanath Rai and others.

CASE VI.

Q. A woman having obtained her deceased husband's sanction to adopt a son, a person executed an instrument, purporting to give his son to her for adoption; and she having accepted this instrument, was ready to perform the ceremonies prescribed for adoption. In the interim, the father of the boy carried him away from the place, and initiated him by the ceremony of tonsure, without the consent of the widow, who having received this intelligence, at first refus-

ed to accept the boy for the purpose of adoption, and looked out for another; but ultimately she adopted the boy whose tonsure was performed by his natural father. Under these circumstances, is the adoption legal and valid?

R. Supposing that the father, after the widow's acceptance of the instrument executed by him to give the boy to her for adoption, carried him to another place, and performed the ceremony of tonsure under the family name of the adopting father without the widow's sanction, the adoption is nevertheless legal, if he be her near kinsman *(Sapinda)*, and if the widow performed the sacrament of the *Homa* and the ceremonies prescribed for adoption. If, on the other hand, the father of the boy performed the ceremony of tonsure under the names of his own father and other ancestors, the adoption would be illegal.

A boy may be adopted after tonsure by the natural father in the name of the adopter.

Zillah Rungpore,
Sept. 28th, 1815.

CASE VII.

Q. A person having left directions with his wife to make an adoption, died, and, subsequently, his widow, at one and the same time, adopted two sons; in this case, is the adoption of both, or either, good and valid?

R. If a childless person, from religious motives, desire his wife to adopt a son, the child so adopted becomes the substitute of a legitimate son. The widow is with such permission competent to adopt. From the direction of the husband, as it is stated in the question, he evidently considered that one substituted son would be sufficient for the performance of religious ceremonies. Consequently, in obedience to such order, the widow cannot adopt two sons at the same time, and the second adoption is illegal.

A widow, having received instructions from her husband to adopt a son, cannot make two adoptions at the same time. The one made secondly will be invalid.

Authorities.

"A son of any description, must be anxiously adopted by one who has none: for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name."

In the text, the word "son" is in the singular number: the author of the *Dwaitanirnaya* construes this as forbidding many adoptions, &c. *Menu:* "Sages declare these eleven sons, (the son of the wife and the rest,) as specified to be substitutes for the real legitimate son; for the obsequies would fail, *(Kriyalopat.)*"

Dacca Court of Appeal,
April 30*th*, 1813.

CASE VIII.

2. A Brahmin had four sons, one of whom died childless before him. Subsequently to his death, the father took the elder son of one of his surviving sons, and gave him to the widow of his deceased son to be taken by her in adoption. In this case, is such adopted son declared by law an heir to the deceased, or not?

A woman cannot adopt a son *(Dattaca)* without the permission of her husband, nor can an only son or the eldest son be given in adoption.

R. A widow is incompetent to adopt a son; and if she has sons, she cannot give one of them to any one. Whatsoever person has an only son, such son cannot be given in adoption; and whatsoever person has many sons, the eldest son should not be given.

Vasishtha says: "Let not a woman either give or receive a son in adoption, unless with the assent of her husband."

So also: "Let no man give or accept an only son."

Where there are many sons, the eldest of them shall not be given for affiliation. *Menu:* "By the eldest, as soon as

born, a man becomes father of male issue, and is exonerated from the debt to his ancestors."

Zillah Bundelkhund,
April 14th, 1816.

CASE IX.

Q. Is a son given *(Dattaca)* entitled to inherit from his natural father?

A son given *(Dattaca)* cannot inherit his own father's property.

R. A given son has no right to succeed to his natural parents, as *Menu* says: "A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate; but of him who has given away his son, the obsequies fail."

Zillah Shahabad,
May 13th, 1816.

CASE X.

A woman's assertion that she had been authorized by her late husband to adopt a son, is not sufficient proof.

Q. 1. If a woman, asserting that she had received permission from her husband to adopt a son, shall make such adoption, and the granting of the permission be not supported by any other evidence besides her assertion, is the adoption legal?

R. 1. If the woman state herself to have been authorized by her husband to adopt a boy, and the sanction be not proved by the testimony of witnesses or other evidence, the adoption in such case is not legal.

Authorities.

"Let not a woman either give or receive a son in adoption, unless with the assent of her husband." *Vasishtha,* cited in the *Dattacachandricá* and other authorities.

An adopted son may lawfully bind him-

Q. 2. If a dispute arise between an adopted son and his adopting mother, and, to decide it, the adopted son execute

self not to take possession of the estate until after his adopting mother's death, and to forfeit it on breach of the condition.

an agreement of the following purport, that his mother is to remain in possession of the landed property during her lifetime, and that he is to inherit after her only on the following condition: that should any serious difference occur between his mother and himself, he is to lose all his rights, and his adoption to be held void; does such document, on the occurrence of any difference between them, confer a legal right on the mother to disinherit the adopted son?

R. 2. Under the circumstances stated, such agreement does confer the right alluded to on the mother, because the owner of any possessions may dispose of them as he pleases. This opinion is conformable to the *Dáyabhága*, *Vivádabhangárnava*, *Vivádárnavasetu*, and other tracts.

Authorities.

The text of *Náreda* cited in the above authorities: "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."

Musst. Taramunee Dibia, *v.* Debnarain Rai and Bishenpershad.

Sudder Dewanny Adawlut, January 14th, 1824.

CASE XI.

Q. An inhabitant of *zillah* Shahabad, (being childless at the time,) took his brother's son, and made him his adopted son. Subsequently to the adoption, a son was born to the adopting father. In this case, on the death of the adopting father, to what proportions of the property left by the deceased is each of the sons entitled?

An adopted, sharing with a son of the body, is entitled to a fourth.

R. Under the circumstances stated, the property should be divided into four shares, three of which will be taken by the son of the body, and the remaining one by the adopted

son. This opinion is conformable to the *Mitácshará*, *Dattacamimánqsá*, and other authorities, as current in the district of Shahabad*, &c.

Authorities.

The text of *Vasishtha*, cited in the above authorities: "When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part."

Sudder Dewanny Adawlut.

CASE XII.

Q. A person was survived by his five sons A, B, C, D, and E, who enjoyed their father's estate in joint tenancy; and then A and C died childless, but the latter left a widow. Subsequently to their death, the three surviving brothers B, D, and E, having made a division of the property in equal portions among themselves, lived apart; and after such partition B and E died, the former leaving two sons, and the latter a widow and a daughter's son, whose adoption by his maternal grandfather, E, has been proved by unquestionable testimony. After E's death, his widow and daughter's son took possession of one-third of the original proprietor's property, that is, E's legal share, and exercised the right of ownership over it for the space of four years; now D and B's two sons oust them from the estate. In this case, are E's widow and daughter's son entitled to any share of the original proprietor's property, or otherwise? Supposing E not to have adopted his daughter's son, is such grandson entitled to inherit from his maternal grandfather?

* This is the proportion to which the adopted son is entitled, according to the law of Benares; but according to the law of Bengal, he may claim a third.

A daughter's son may be adopted in preference to a brother's son; but see note.

R. If, of the separated brothers, the youngest, having taken his daughter's son in adoption, died, such adopted son is alone entitled to the property to which the deceased was entitled.

"All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten: but should a true legitimate son be afterwards born, they have no right of primogeniture. These twelve sons have been propounded for the purpose of offspring: being sons begotten by a man himself, or procreated by another man, or received (for adoption), or voluntarily given." The two texts of *Devala.*

"Among these, the next in order is heir, and presents funeral oblations on failure of the preceding." *Yájnyawalcya.*

The daughter's son inherits after the daughter.

If the daughter's son should not have been received in adoption, in the first instance E's property will go to his widow, and in default of her, to the heir who is next in order.

"The wife and the daughters," &c. *Yájnyawalcya.*

Vishnu:—"The wealth of him who leaves no male issue goes to his wife."

The daughter's son is an heir, and property devolves on him according to the order of succession.

"Let the daughter's son take the whole estate of his grandfather who leaves no (other) son, and let him offer two funeral oblations; one to his own father, the other to his maternal grandfather." "If one die, leaving neither son nor grandson, the daughter's son shall inherit the estate; for, by consent of all, the son's son and the daughter's son

are alike in respect of the celebration of obsequies." *Menu* and *Vishnu**.

Zillah Mirzapore,
July 18th, 1808.

CASE XIII.

Q. A person named Sheonath, an inhabitant of Bengal, and proprietor of half an ancestral landed estate, died in the year 1204 B. S., leaving a pregnant widow by name Bhuguvutee, and an uterine brother named Govindpershad; in the same year his widow brought forth a daughter, which was named Gunga Mya; the widow died in 1207 B. S. Gunga Mya, in the year 1217 B. S. was married to a person called Ramkishub Dutt. Govindpershad, the original proprietor's brother, died in the year 1218 B. S., leaving Kishenkishore a son, and Daya Mya a daughter. In the year 1226 B. S., Ramkishub Dutt, the husband of Gunga Mya, died childless. Whether, on the death of the original

* "The *reverend Saunaca Muni* (as he is called by *Goverdhana*) says, *Brahmins* should adopt sons from among their own *Sapindas*, and on failure of *Sapindas*, from among those not *Sapindas*. Among *Sapindas*, the brother's son is to be considered as the best. If a brother's son does not exist, a *Sapinda* who is also a *Sagotra* is to be chosen. If such is not to be found, a *Sapinda* not a *Sagotra*. If such is not to be found, a *Sagotra* not a *Sapinda*; and if such is not to be found one neither a *Sagotra*, nor a *Sapinda*. *But in no case, a sister's or a daughter's son,* or those whom *common sense* prohibits the *adoption* of, such as a *brother*, a *paternal uncle*, or a *maternal uncle*. Among the three classes, i. e. *Brahmin*, *Cshetria*, and *Vaisya*, adoptions should be made of one of the same class. *The son who was not the first born* is to be given in adoption. Among the *Sudras*, the adoption of a sister's son and daughter's son is valid." Considerations on Hindu Law, page 150.

The above extract is, I take it, a true exposition of the law of adoption; and we must suppose, though it is not distinctly stated, that the parties in the case which gave rise to the question in this instance were *Sudras*; otherwise the reply does not seem consonant to law.

proprietor, was his widow Bhuguvutee, or his brother Govindpershad, entitled to inherit his estate? If the widow was the proper heir, whether was Govindpershad or her daughter Gunga Mya entitled to inherit the estate on her death? If the daughter was the proper heir, and if she by consent of her husband adopted a son, was such adopted son entitled to inherit the estate on her death; and if he was not, who was the proper heir on whom the estate should devolve after the death of Gunga Mya?

Ancestral property which had devolved on a daughter will not at her death go to her adopted son, but to the heirs of her father.

R. On the death of Sheonath, his property belonged, of right, to his widow Bhuguvutee, and not to his brother Govindpershad; for the estate of him who dies leaving no other heir down to a great-grandson, devolves by the law of inheritance on his widow. On the death of Bhuguvutee, the estate which she had inherited from her husband should devolve on her daughter, who was unmarried at the time of her husband's death, and not on the brother of Sheonath; for, by the law of inheritance, of the three descriptions of daughters, that is, the unmarried daughter, she whose husband is living, and of whom there is probability of a son being born, and the daughter who has borne a son, the first mentioned has the best title to the succession, in default of other preferable heirs; but the son adopted by Gunga Mya, by the consent of her husband, has no title to the estate to which she had succeeded, because, according to the *Dáya-bhága,* an adopted son has no legal claim to the property of a *Bandhu* or cognate; and according to the interpretation of the text of *Menu,* which admits adopted sons to the right of succession collaterally, the meaning is, succession to the property of persons belonging to the same family as the adopting father, as fully appears from the *Manwartha Mooktávalee,* compiled by *Cullucabhatta,* and other authorities. On the death of Gunga Mya, therefore, the estate left by her father, to which she had succeeded on the death of her mother, and her right to which was limit-

ed to a life interest, should devolve on Kishenkishore, the brother's son of her husband, because when an estate devolves on a childless widow, who is held to be half the body of her husband, it reverts at her death to the heirs of her husband. So an estate which had devolved on a daughter, who has a weaker claim, should, *a fortiori*, revert to the heirs of her father.

Authority. The text of *Yájnyawalcya*, cited in the *Dáyabhága* and other law tracts: "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates," &c. (*Dáyabhága*, page 160.)

Sudder Dewanny Adawlut,
September 1st, 1821.

Gunga Mya, *v.* Kishenkishore Chowdhry and others.

CASE XIV.

Q. 1. A, the proprietor of a *raj* and *zemindaree*, died leaving three sons, B, C, and D. His estate descended entire to his eldest son B. B died leaving a son E, on whom the estate devolved entire. C died leaving two sons, F and G, the former of whom died before E. D died leaving a son, H, who also died before E. G has a son, I. E died childless, and on his death his widow, J, took possession of the estate, and without his permission adopted a son, K (the father of L), obtaining, however, the consent of her husband's relations, under whose control she was living. On her death, I, the son of G, claims possession, as heir to her husband, E. Is the adoption by J legal or illegal; and by virtue of it does the estate in question go to K, the son so adopted, and his heirs?

The adoption by a widow of a son, without the express

R. 1. Although according to the *Viramitrodaya* and *Vyavahára Koustubha*, the adoption of a son by a widow, having obtained the consent of her husband's relations, has

permission of her husband, is illegal. The consent of her husband's heirs is not sufficient, according to the law of Benares.

been declared valid, yet as this doctrine has been refuted in the *Dattacamimángsá*, the adoption of K, the father of L, by J, the widow of E, without the consent of E, as admitted by J, is illegal, according to the authority of the *Dattacamimángsá*, which is current in Gorukhpore.

Authorities.

Authority for the above opinion.

1st. Accordingly *Vasishtha* ordains: "Let not a woman give or receive a son in adoption, unless with the assent of her husband." From this the incompetency of the widow is deduced, where the assent of her husband is impossible. Nor should it be argued, that the assent of the husband is only requisite for a woman whose husband is living, on the principle of her being subject to his control, but not so for a widow; because mention is made of women generally, and dependency on control is not the cause assigned. Her dependency on control has been declared in another text: "On default (of her husband), her kinsmen," &c. Should it be argued, that she may adopt a son with the consent of the kinsmen, that is wrong, for the term husband would be irrelevant, and the purpose would not be attained. Now the purpose of the husband's sanction is, that the filiation as son of the husband may be complete, even by means of an adoption made by the wife.—*Dattacamimángsá.*

Q. 2. If the adoption of K is illegal, to whom among the descendants of A does the ancestral estate belong, after the death of J, who has lately deceased?

The cousin of her husband, that is to say, the son of his father's brother, is heir on the death of the widow, to the

R. 2. As the adoption of K has been shewn to be illegal according to the *Dattacamimángsá*, the estate of E, which had descended to him entire from B and A, will go to G, the second son of C, and grandson of A, from the circumstance of C and D, the two younger sons of A, and F the

elder son of C, and H the son of D, having died before E[*], and on the death of G it will go to his son I. This opinion is delivered in conformity to the *Mitácsharà*, which is current in Gorukhpore.

ancestral estate which had devolved on her, provided there be no nearer relation of the husband.

Authorities.

1st. "To the nearest *Sapinda* the inheritance next belongs." Text of *Menu*, cited in the *Mitácsharà*.

Authority for the above opinion.

2d. "Gentiles are, the paternal grandmother, and relations connected by funeral oblations of food and libations of water. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons; on failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of kindred belonging to the same general family, and connected by funeral oblations. If there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food: or else as far as the limits of knowledge as to birth and name extend. Interpretation by the author of the *Mitácsharà* of the text of *Yájnyawalcya:* "The wife and the daughters, also both parents, and brothers likewise, and their sons, gentiles, cognates," &c. *Mitácsharà*.

Ditto.

Ditto.

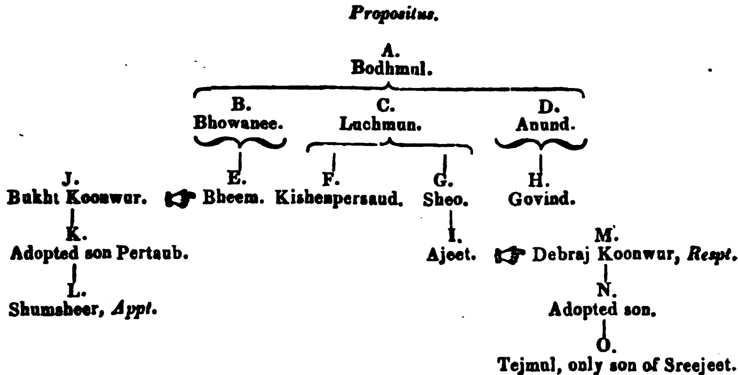
Q. 3. Is M, the widow of I, (who has lately deceased,) entitled to retain possession of the estate during her lifetime?

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[*] The cousin on the father's side is the seventeenth in the order of succession. In this case the widow, J, had no right to possession during her lifetime; but the question of her title was not agitated, she being dead.

And is N, the only son of O, entitled to succeed to the estate either during the lifetime of M, or after her death, in right of his adoption?

THE FOLLOWING IS A SKETCH OF THE FAMILY IN THIS CASE.



According to the law of Benares, a widow has no right of succession to the undivided property of her deceased husband.

The adoption of an only son is invalid.

R. 3. Now after the death of I, his widow, M, is not entitled to retain possession of the estate during her lifetime, which descended to him entire, because according to the law*, the widow is only entitled to the divided property, moveable and immoveable, left by her husband. The law forbids the giving and receiving, in adoption, of an only son. If, therefore, O gave his son N to I for the purpose of adoption, and I, in concert with M, adopted him accordingly, such adoption is not valid, and N had no right to succeed to the undivided immoveable estate left by I, either during the lifetime of M, or after her death. If O gave his son N to be adopted by I, with the stipulation that he should be a son of both, and I received him accordingly, and adopted him with the necessary ceremonies, then such affiliation

* This constitutes the grand difference between the law of Bengal and the law of Benares relative to a widow's succession to her childless husband's estate, the former admitting it in all cases, whether the estate is divided or undivided, and the latter only in the case of a divided estate.

is termed the *Dwamushyayuna* form of adoption, which signifies, that the person adopted is the son both of the giver and receiver. Such adoption is allowable according to the *Dattacameemángsá*, which is current in Gorukhpore; and N, being the *Dwamushyayuna* son of I, by means of such adoption will take the estate of I, even during the life-time of M, his widow. This opinion is delivered in conformity to the *Mitácshará*, the *Dattacameemángsá*, and other authorities current in Gorukhpore.

Unless according to the *Dwamushyayuna* form of adoption, by which the person affiliated is considered to be the son both of his natural and his adoptive father.

Authorities.

1st. "When a man who was separated from his coheirs, and not reunited with them, dies, leaving no male issue, his widow, if chaste, takes the estate in the first instance." *Mitácshará.*

2d. "Let no man give or accept an only son, for he is destined to continue the line of his ancestors." Text of *Vasishtha*, cited in the *Mitácshará*, *Dattacameemángsá* and other authorities.

3d. "By no man having an only son is the gift of a son to be ever made." Text of *Sounaca*, cited in the *Dattacameemángsá*.

4th. "But the father has not authority to give away or sell a son." This text relates to the case of an only son. *Dattacameemángsá*.

5th. Accordingly, given sons and the rest (who are sons of two fathers) are of two descriptions, perfect *Dwamushyayunas* and imperfect *Dwamushyayunas*. Those are called perfect who are adopted after this stipulation between the natural and adoptive fathers, "This is son of us two." The imperfect are those who are initiated by

their natural father in ceremonies ending with that of tonsure, and by the adoptive father in those commencing with the investiture of the characteristic thread: since they are initiated under the family names of both, they are sons of two fathers; but imperfectly so. *Dattacameemángsá.*

6th. Those who present the funeral oblation take the inheritance in the order of propinquity. *Mitácshará.*

7th. Of these twelve sons abovementioned, on failure of the first respectively, the next in order as enumerated must be considered to be the giver of the funeral oblation or performer of obsequies, and taker of a share or successor to the effects. *Mitácshará.*

Q. 4. And if not, that is to say, supposing such adoption to be invalid, and the widow M, to have the right of possession during her lifetime, which among the descendants of A will succeed after her death?

An answer to these questions is required to be delivered according to the law of Gorukhpore.

The nearest heir of her husband will succeed to the estate of a widow which had devolved on her at her husband's death.

R. 4. After the death of M, supposing her to have the right of possession during her lifetime, and the adoption of N to be invalid, the nearest heir (of her husband) alive at the time of her death will succeed. The authority for this is similar to that adduced in answer to the third question.

Sudder Dewanny Adawlut,
3*d January,* 1815.

Rajah Shumsheer Mul, appellant, *v.* Ranee Dilraj Koonwur, respondent.

CASE XV.

Q. 1. A person of the *Cait* class adopted the second son of a person distantly related to him by the paternal side, such person having no other son living at the time when the adoption was made. In this case, is the adoption legal, or otherwise?

The only son of a distant relation cannot be received in adoption.

R. 1. Under the circumstances stated, the adoption is illegal, according to the text of *Vasishtha:* " An only son let no man give or accept," &c. &c.

Q. 2. If the son of a person by his senior wife be dead, and subsequently another son be born to him of his junior wife; in such case, is the son subsequently born substituted for the elder son, and consequently not a fit subject to be given or received in adoption?

Nor the eldest son living, though not the first born.

R. 2. If after the death of the son by the senior wife, the junior wife have brought forth a son, such second son is considered in the light of a first born, it being assigned to him to perform the duties of primogeniture. Therefore such son cannot be given in adoption or affiliated by another individual.

Zillah Sarun,
January 7th, 1809.

CASE XVI.

Q. 1. Is a woman of the *Brahminical* class (inhabitant of *Tirhoot*) competent, without her husband's permission, to adopt a son as her *Kurtapootra,* with a view of securing the due performance of her exequial rites? Supposing her to have once adopted such a son, and subsequently to disclaim the adoption, in this case, can such adoption be considered as good and binding?

A widow (inhabitant of Tirhoot) may adopt a *Kritrima* son without her husband's permission.

R. 1. The childless wife of a *Brahmin* in *Tirhoot* is competent to adopt a person of her own class as her *Kurta* or *Kritrimapootra,* for the performance of her exequial rites, even though she may not have been authorized so to do by her husband. *Menu:* "He is considered as a son made *or adopted,* whom a man takes as his own son, the boy being equal in class." *Boudháyana:* "He whom a man adopts, the boy being equal in class, and consenting *to the adoption,* is a son made."

"By a man destitute of a son, must a substitute for the same always be adopted."

From these texts it may be inferred, that a woman may adopt a son for the performance of her exequial rites. It is not laid down by the legal authorities, that the husband's permission is necessary to the adoption of a son made, but such adoption takes place agreeably to established usage. If the woman, after such adoption, be desirous of receding from it, and disclaim the adoption, the filiation of the son made cannot be set aside, for there is no text authorizing the reversal of an adoption.

Q. 2. Is the woman competent to adopt a minor as her *Kurtapootra,* after his having been initiated by the ceremony of *Upanayana,* or investiture with the marks of the class?

And after the ceremony of *Upanayana* has been performed on the boy.

R. 2. The woman is competent to adopt a boy of her own class, whose *Upanayana* ceremony has been performed, with his parents' permission, as her *Kurta* or *Kritimapootra.* In the case of adopting a son in the *Kritima* form, the consent of both the parties is necessary, and, the boy adopted not being independent of his parents, their sanction is required. This opinion is consonant to the

doctrines of the learned *Vachespatimisra* and others, whose works are current in Mithila.

Zillah Purnea,
August 4th, 1809.

CASE XVII.

Q. 1. There were three brothers (landed proprietors) who jointly possessed an ancestral immoveable estate, and one of them, having no male issue, adopted the son of one of his brothers as his *Kurtapootra,* or son made; in this case, is such adoption good and valid?

A son of a brother may be taken as a *Kritrima* son.

R. 1. One of the three brothers abovementioned being destitute of male issue, and having adopted the son of one of his brothers as his *Kritrimapootra,* or son made, (commonly called *Kurtapootra,)* such adoption is legal. *Atri* says: "By a man destitute of a son," &c.

Q. 2. When the childless brother adopted the son of his brother as his *Kurtapootra,* the boy was the only issue of his parents. In this case, is it allowable that an only son can be adopted by his uncle as his *Kurtapootra?*

Even though he be an only son.

R. 2. Under the circumstances stated, the adoption is legal, by reason of its having been made by the uncle. The text of *Vyasa:* "Accordingly, *Bhairava* at one time cohabited with *Urvasi,* a celestial nymph, and procreated on her a son, named *Suvesa. Vetala* also affiliated him as his son: and in consequence, by means of this son, both attained salvation."

Zillah Tirhoot,
June 22d, 1824.

CASE XVIII.

Q. A *Sudra,* with the intention of making him his adopted son, took a boy of four years old from his brother, and

supported him, and performed the ceremony of his marriage under his own (the adopting father's) name. Subsequently to this, the adopting father had three sons by his lawful wife. Now, supposing the prescribed ceremony for the adoption not to have been performed by the individual in question at the time when he took the boy, in this case, is the adoption complete, so as to entitle the adopted son to inherit the property left by the adopting father, or otherwise ?

An adoption is not valid without the observance of certain prescribed forms.

R. It appears in this case, that the *Sudra* did, with the intention of adopting a son, take a boy of four years old from his brother, and supported him ; that he performed for him the ceremony of marriage under his own name, and shortly after had three sons by lawful wedlock; and that the prescribed ceremony for adoption was not performed by him at the time of his taking the boy for the purpose of adoption. Here, according to law, the affiliation of the boy cannot be considered as complete, nor is he entitled to the property of the person who took him for adoption. This opinion is consonant to the doctrines cited in the *Dattacameemángsá, Dattacachandricá, Vivádachintámani,* and other authorities.

Authorities.

" The same author propounds a special rule, should the due form for adoption not be observed: " He who adopts a son, without observing the rules ordained, should make him a participator of the rites of marriage, not a sharer of the wealth." The meaning is: the marriage only, of one adopted, without the form for adoption, is to be performed; no wealth is to be bestowed on him: on the contrary, in such case, the wife and the rest even succeed to the estate : for, without observance of form, his filial relation is not produced. Therefore the filial relation of these five sons proceeds from adoption only, with observance of the form of either; not otherwise. Of gift, acceptance, a burnt sacri-

fice, and so forth, should either be wanting, the filial relation even fails." The *Dattacameemángsá.*

" In case no form as propounded should be observed, it will be declared that the adopted son is entitled to assets, sufficient for his marriage. And as a text recites, " Let the father initiate his own sons," the initiatory rites even, of the adopted, which are yet to be completed, subsequent to adoption, are to be performed by the adopter; and thus the practice of all the ancients even, in respect to the adoption of a son, unlimited to any particular time, is upheld. For the construction suggested (by us, of the supposed extract from the *Puránas)* is self-evident. Accordingly, an author declares, the non-succession to a share, of one adopted without observance of rule: " Him existing, a son being created, and a son given existing, one being adopted informally; that estate is his only, who is justly master of the father's wealth." *Menu.* " He who adopts a son, without observing the rules ordained, should make him the participator of the rites of marriage, not a sharer of the wealth." The *Dattacachandricá.* " The boy who was adopted without the form prescribed by law, is a semblance of a son, and is not entitled to participate his wealth." The *Vivádachintámani**.

Calcutta, Court of Appeal,
April 20th, 1810.

CASE XIX.

Q. A person, having a son, left directions with his wife, while afflicted with disease, to adopt a son, and died. Subsequently to his death, the widow applied to the court for

* But the exact observance of any particular ceremonies is not necessary. It is sufficient that certain of the forms prescribed for adoption are gone through, with a view to prove unequivocally the intention of the adopter.

permission to make an adoption. In this case, can the widow be permitted to adopt a boy, the son of her husband being alive at the time ?

R. Although the husband left directions with his wife to adopt a son, yet she cannot make an adoption while a son of her husband is living; for it is prohibited to a wife to adopt a boy while a son is living*.

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* The incompetency of one having male issue is signified by the term "only" in this passage. "It would follow that the adoption of a son, by one whose son had died, notwithstanding the existence of a grandson, were without reason. It therefore results, that one *only* destitute of a grandson, and great-grandson, may adopt." Mr. Sutherland, in his Synopsis, commenting on this passage of the *Dattacachandricá*, observes: "It is necessary that the person proceeding to adopt, should be destitute of male issue capable of performing those rites. By the term issue, the son's son and grandson are included. It may be inferred, that if such male issue, although existing, were disqualified by any legal impediment, (such as loss of caste,) from performing the rites in question, the affiliation of a son might legally take place."

This is unquestionably an accurate exposition of the law of adoption. The author of the *Vivádabhangárnava*, however, observes, that "the adoption of a son given, although a son of the body be living, being thus valid, he shall have a third part of his share, in the same manner with a son given, subsequently to whose adoption a son of the body was born;" and that *Sri Dharaswámi*, in his gloss on a verse of the *Sri Bhagavata*, ("To *Ruchi*, O king! with the consent of *Setampa*, he gave *Acuti*, imposing on her the duty of an appointed daughter, although she had brothers living,") cites a text of law on the benefit arising from a multitude of sons, to explain the motive for desiring many children when a subsidiary son is adopted, even though a principal one be living: "Many sons are to be desired, that some one of them may travel to Gaya." It is written also in the *Mahabhárata* and other works, that "*Pándu*, having other male issue, accepted of *Bhima*, *Arjuna*, and other sons of his wife." And the author of the *Dattacacowmudi* impugns the doctrine laid down in the *Dattacameemángsá*, and maintains that it is absurd; contending, that if the

CASE XX.

Q. A man of the first class, while afflicted with leprosy, adopted a son. In this case, is the adoption good and valid?

A leper cannot adopt.

R. A person afflicted with leprosy is incompetent to adopt a son; for he bears the impurity till *death;* consequently the adoption must be considered as void*.

CASE XXI.

Q. A person having been afflicted with leprosy, or the like disease, performs the expiation *(Prayaschitta)* ordained in the law for it, and adopts a boy as his son. In this case, is the adoption good and legal, or otherwise?

Unless he have performed the prescribed expiation.

R. The person afflicted with leprosy or the like disease, after his performance of the prescribed penance, becomes

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authority of *Menu, Viswamitra, Pándu,* and others be not considered to justify any practice, it is vain to seek for any other guide. In the same work, however, the following condition is declared: "A man, though possessed of male issue, may adopt another son, *with the sanction of such issue.*"

It may, on the whole, be safely concluded, that whatever may have been the law or the practice in former ages, the simultaneous adoption of two sons, or the affiliation of one by a person who has a son (either his own issue, or adopted,) living, is now illegal, according to the concurrent testimony of the most approved authorities.

* It is not distinctly stated in this case whether the leper performed the prescribed expiation. Certainly the opinion is correct, provided the leper have not performed expiation; but if performed, the adoption is legal, for the impurity of the leper is removed after penance performed. See the following case.

purified, and is competent to perform *Parvanu,* or double rites and ceremonies, as declared in the *Veda;* therefore the adoption made by the person so purified is good and legal*.

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* The opinion is correct, but the law officer by whom it was delivered has omitted to support it by any authority. The following passage from the Digest of *Jagannátha* may serve to supply the omission. " *Raghunandana* holds, that expiation for a man afflicted with elephantiasis, or other similar disease, is ordained for the purpose of enabling him to perform acts of religion ordained in the *Veda.* By parity of reasoning he becomes competent to inherit property, as well as to perform religious ceremonies."

CHAPTER VII.

CASES OF MINORITY.



CASE I.

Q. A person died possessed of some real and personal property, partly ancestral and partly acquired, leaving a widow under age. In this case, is his father-in-law (the father of his widow), or his grandfather's brother (whether he lived with the deceased in union or was separated from him), entitled to manage the estate?

The management of an estate which has devolved on a minor widow rests with her husband's relations, and with her own relations only in their default.

R. The management of the estate of the infant widow first rests with her husband's relation, that is, his grandfather's brother, but not with her own father, while such relation exists: in default of the husband's relations, her father becomes her guardian; as is laid down in the text of *Náreda* quoted in the *Dáyabhága*: " When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *Sapinda*."

Zillah Hooghly
July 8th, 1815.

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CASE II.

Q. A minor orphan has an elder adult brother and two sisters, who are also adult and married. In this case, which of the individuals above specified is, according to law, considered to be the guardian of the minor, as far as concerns the disposal of him in marriage?

Order of relations entitled to dispose of a minor in marriage.

R. The elder brother is alone competent to dispose of the minor in marriage, because it is laid down in the *Mitácsharà*, that in the first instance, the father is to perform the initiatory ceremony, such as the marriage of his daughter; in default of him, the grandfather; on failure of the grandfather, the brother, the uncle and his son (next in order); and that on failure of all the persons above enumerated, the mother has the right of disposing of her in marriage. Therefore the right of disposing of the boy in marriage in this case rests solely with his elder brother. His sisters and their husbands have no right to interfere.

Zillah Allahabad,
January 10th 1821.

CASE III.

Q. In the case of a childless widow who is a minor, and whose father and husband's sister's son are both living, which of the individuals in question is entitled to the management of her property?

The father cannot act as guardian to a minor widow, while her husband's sister's son is living.

R. Of the individuals above specified, that is, the widow's father and her husband's sister's son, the latter is her proper guardian in respect of her maintenance, and in the disposal of the property and care of herself; as on her death, he is the successor to the property. This opinion is conformable to the *Dáyabhága, Dáyacramasangraha, Dáyatatwa,* and other authorities.

Zillah Junglemehals,
July 2d, 1822.

CASE IV.

Q. A landed proprietor died, leaving two minor sons. The mother and paternal uncle of the minors are living. In this case, does the guardianship of the minors' person and estate rest with their mother, or with their paternal uncle?

The mother is entitled to the guardianship of her minor children, in preference to their uncles.

R. The guardianship of the infants in respect of their person and property, rests with their mother; but if the mother sell or otherwise alienate their property, excepting always a case of necessity, as if food and raiment be absolutely requisite, she should be divested of the management of the estate, and it should be confided to their uncle, supposing him to be competent and honest.

Zillah 24-Pergunnahs,
May 10th, 1810.

CASE V.

Q. A person died, leaving a widow and son. The widow, during the lifetime of her son, brings an action against an individual for some of her husband's immoveable estate. In this case, should the action by her, according to law, be held to be admissible, or not?

A widow having a son may sue for her husband's property, if her son be a minor.

R. Where the son of the deceased proprietor is living, the suit instituted by his widow claiming his property cannot be admitted unless the son be a minor, that is, unless he be under sixteen years old, in which case the action by her on his behalf should be held to be admissible, she acting the part of his guardian.

Moorshedabad Court of Appeal,
February 15th, 1814.

CHAPTER VIII.

OF GIFT.



CASE I.

Property having been assigned to a Brahmin for spiritual purposes, cannot legally be given away without the assignee's consent.

Q. 1. A person assigns his whole property, or a part of it, by a written instrument to another, mentioning in the instrument, that during his and his wife's lifetime, they should retain the property assigned in their own possession, and that after their death, he (the assignee) having performed their exequial rites, should enjoy it; but some time afterwards he gives a part of the property so assigned to another person, and delivers the gift into the latter donee's possession. Under these circumstances, has the last gift validity, or will it be annulled on the strength of the former one?

R. 1. Supposing the person to have assigned the property in favour of a *Brahmin* for performing religious ceremonies, as the worship of idols, solemnization of obsequies, and the like, and the assignee should perform the required conditions, the latter gift cannot be considered good and valid; but if he have bestowed it in the presence of the former assignee, and the latter donee have enjoyed it without molestation, then the last gift is irrevocable.

Q. 2. If the assignor, during the time he retained the property in his hand, transferred a part of it to another person by deed of gift, and put him (the latter donee) into possession of the gift, and again dispossessed him therefrom,

in this case, can the latter donee bring an action against the donor for the gift in virtue of the deed?

An action for dispossession will lie by a donee against the donor.

R. 2. Under the circumstances stated, the latter donee is authorized to sue the donor to obtain possession of the gift, and the donor is bound to satisfy his claim.

Q. 3. The former assignee, on the death of the assignor, having performed the acts required in the deed of assignment, claims the property occupied by the latter donee; in this case, is the assignee entitled to such property?

And a donee in actual possession is not accountable to a previous assignee.

R. 3. Supposing the assignor to have bestowed immoveable or other property which he had in his own possession on another person, and to have put the donee into possession of it, then, on the death of the assignor, the assignee cannot legally sue the latter donee for the property. Should the assignee have fulfilled the injunctions prescribed in the deed, he is entitled to the assignor's whole property, excepting that part which was given to the latter donee.

A gift cannot be retained in the hands of the donor.

Q. 4. A person having made a gift of his real and personal property to another, executed a deed to that effect. In this case, is he (the donor) competent to retain the gift in his own possession for the period of fifteen or twenty years?

R. 4. The donor is incompetent to keep the gift in his own possession. This is a received maxim.

Calcutta Court of Appeal,
March 3*d*, 1803.

Govindram Misra, *v.* Kishorelaul Sookul.

CASE II.

Q. A certain farmer had a family by his two wives, that is to say, by the first wife two sons, A and B, and by the

second two sons, C and D, and a daughter, E. His son A having separated himself from him, lived apart, and left the family house. His (the father's) eldest wife died before he contracted a second marriage, and his three sons, B, C, and D, and his second wife, lived with him as an united family until his death. Subsequently to his death, his three sons (who lived with him jointly) held the farm, and lived together as an undivided family. After some time, however, being unable to discharge the rent due from the farm, they resigned it, separated, and quitted their dwelling house. After such separation they never reunited. C and D lived again in their father's house, and C alone obtained a portion of his father's farm. Some time after, B returned, and resided in a room of the house. C and D died, leaving neither child nor widow. Subsequently to their death, their mother got possession of the farm, and discharged the rents due. She then executed a deed of gift of the whole farm in favour of her daughter E, and her daughter's son, for their support and for her own exequial rites, and died. Now B claims the property given by his step-mother. Under these circumstances, is the claimant entitled to inherit it, or is the gift legal?

A mother is not competent to make a gift to her daughter of a farm which she had inherited from her son, and on her death it will go to her sons' unassociated half brother.

R. If the donor enjoyed the farm by right of inheritance as heir to her son C, in this case, she was not competent to give the whole farm to her daughter and daughter's son, without the sanction of her step-son B; consequently the farm would, on her death, devolve on the claimant (B.) Should the donor, however, have obtained a transfer of the farm in her own name, and procured it to be registered as hers in the books of the proprietor, and thus have obtained a new title, under these circumstances she was authorized to make a gift of it, and the gift is legal. Therefore the donor's daughter and her son derive a clear title by virtue of the gift, and B has no concern with it.

Zillah Midnapore.

CASE III.

Q. A landed proprietor had two sons, the eldest of whom died, leaving two sons. Subsequently he (the proprietor) disposed of his entire ancestral estate, consisting of moveable and immoveable property, by a deed of gift in favour of his second son. In this case, is the gift legal or otherwise?

An ancestral landed estate cannot be given to one son, to the exclusion of the sons of another son.

R. He is incompetent to make a gift of the immoveable estate which devolved on him from his forefathers to his second son, without the consent of his eldest son's sons, and the deed of gift is null and void. He is entitled to give jewels and other moveables, though inherited from the grandfather. This is conformable to the *Vivádaratnácara, Mitácshará*, and other authorities.

Authorities.

Yájnyawalcya:—"The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels."

"The father has no power to make an unequal partition, or to make a gift of the ancestral property. This is the doctrine of the *Vivádaratnácara*."

"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should, therefore, be made."

Yájnyawalcya:—"The father is master of the gems, pearls, and corals, and of all other moveable property: but neither the father nor the grandfather is so of the whole immoveable estate."

Zillah Bhagulpore,
April 7th, 1819.

CASE IV.

Q. 1. A childless widow had obtained her husband's estate, consisting of land and other property, by right of inheritance. Is she competent to give or sell the property, while there are her husband's other heirs living; and if she make any alienation, is it legal and valid?

R. 1. The widow destitute of male issue may give a part of her husband's property of both descriptions, moveable and immoveable, for the completion of her husband's exequial rites; and when she is in want of subsistence for herself, she may sell such portion as may provide her with maintenance: excepting under these circumstances, any alienation by her, whether by gift, sale, or otherwise, must be considered null and void.

A widow may alienate a portion of her late husband's property for his spiritual welfare, or for her own subsistence.

Q. 2. Is the widow, without the sanction of her daughter's son, entitled to sell a small portion of the property? and supposing her to have actually made such sale, should it be upheld?

R. 2. If the daughter's son supply her with maintenance, she cannot alienate without his consent, and if she had actually sold the property, the sale is null; but in a case where the daughter's son declines to support her, she may sell such portion as may be necessary to her maintenance, without his consent, and the sale should be considered legal and valid.

But not for her own subsistence, if the next heir agree to support her.

The authorities for this opinion are laid down in the *Dáyabhága*: "Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property, or, if still unable, she may sell or otherwise alienate it: for the same reason is equally applicable. Let her give to the pa-

ternal uncles and other relatives of her husband, presents in proportion to the wealth, at her husband's funeral rites."

Zillah Rajshaye.

CASE V.

Q. If a person make a gift of joint property in a proportion exceeding his legal share, in this case, is the deed of gift illegal? or will the donee receive the share to which the donor was entitled?

The gift of joint property, to the extent of the donor's share, is valid (in Bengal).

R. Supposing the donor to have disposed of property appertaining to the joint stock to a greater extent than his own share by a deed of gift, that deed does not become illegal and void; but the donee is entitled to so much as may be found to be the donor's property in the undivided estate. This is consonant to the *Dáyabhága*, *Dáyatatwa*, *Vivádarnavasetu*, and other authorities*.

Zillah Jungle Mehals,
May 26th, 1826.

CASE VI.

Q. The maternal grandfather of a person made a gift of some lands and houses to his grandson's wife, who possessed the gift for some time; and she, while suffering under the disease of which she died, made a gift of the same property to her daughter's son. Her son, having his uterine sister (the plaintiff), another sister's son (the defendant), and a brother of the half blood, gave away the same property. In this case, which of the gifts is legal and binding?

* The law officer by whom the above opinion was delivered has omitted to cite the texts of the works above alluded to; but his exposion is, according to the law of B engal, correct, as may be seen by the remark in a case of sale. See Case No. 1. and 16.

The immoveable property given by a man to his grandson's wife is her peculiar property, over which she has absolute dominion.

R. The gift made by the woman, of the property which she received from her husband's maternal grandfather, is legal, because the property given is her peculiar property, which by law is termed *Soudayica,* or gift from affectionate kindred; and the gift by her son cannot be considered as valid and legal while she lives, because he has no right of proprietorship over it. This opinion is conformable to the *Dáyabhága, Dáyatatwa, Vivádabhangárnava,* and other authorities.

Catyáyana :—"What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord or her parents, is called a gift from affectionate kindred ; and such a gift, having by them been presented through kindness, that the women possessing it may live well, is declared by law to be their absolute property. The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away, as they please, even though it consist of lands and houses."

The following is the interpretation of *Chandeswara,* cited in the *Vivádabhangárnava :* "In the mansion of her husband," the words are so connected, "from her brother or her parents ;" that is merely illustrative : hence, what is received by a woman, either after marriage or before it, in the mansion of her husband, or in the house of her father, from her mother, from her father, or from *other persons,* is *called* a gift from affectionate kindred." *Catyáyana :* "Neither the husband, nor the son, nor the father, nor the brother, have power to use or to aliene the legal property of a woman."

Zillah Nuddea,
July 26th, 1820.

CASE VII.

Q. There were two brothers of the whole blood, who had some ancestral rent-free lands. The elder had an only daughter, but no son, and the younger had two sons. The elder disposed of his daughter in marriage, and either gave a part of the landed estate for his daughter's maintenance, or the daughter, on the death of her father, acquired it by right of succession. The mode of its coming into her possession does not clearly appear. Under these circumstances, is she competent to make a gift of such property to a stranger, without the consent of her paternal uncle's sons?

Landed property which a daughter obtains by a gift is hers absolutely; not so that which she acquires by inheritance.

R. If one of the brothers, having contracted his only daughter in marriage, gave a certain quantity of land out of his ancestral landed estate for her support, and the daughter took possession by right of such donation, in this case, she is competent to give it away to a stranger without the sanction of her father's brother's two sons, as that property is termed the gift of affectionate kindred, over which her independency is recognized. If, on the other hand, the property became hers by succession, she had no power to give it without her father's nephew's consent. This is consonant to the authorities prevalent in Bengal.

Authorities.

The texts of *Catyáyana*, laid down in the *Dáyabhága*, *Dáyacramasangraha*, and other tracts:—" That which is received by a married woman or a maiden, in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The independence of women who have received such gifts is recognized in regard to that property; for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kin-

dred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables."—The following is a passage of the *Dáyabhága:* "Let her enjoy with moderation the property until her death. After her, let the heirs take it.*"

"The word "wife" is employed with a general import: and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."

Zillah Beerbhoom.

CASE VIII.

Q. A man having two minor sons, assigned his property, moveable and immoveable, to his wife by a deed of gift; and now the two sons, being of full age and disposing mind, consent to the gift. Subsequently to the gift, the father contracted a second marriage, and the second wife brought forth a son, who claims the whole personal and real property of his father. In this case, is the gift which the father made previously to contracting a second marriage to be considered good and legal?

Personal property given by a husband to his wife on the occasion of contracting a second marriage, is hers absolutely; not so real property, over which the husband's right endures, notwithstanding the gift.

R. Property presented by a husband, while his two minor sons were living, to his wife, on his espousing a second wife, is denominated a woman's property, and the gift by the husband is complete and binding; but that alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control. The wife has no power to give or otherwise alienate the immoveable property which she received from her husband: hence, though such property be hers, it does not constitute a woman's peculiar property, because she has not indepen-

* The first hemistich is not here cited.

dent power over it. Under these circumstances, the wife has a right only to enjoy her husband's gift of the real estate during her life. On the death of the senior wife, her issue alone are entitled to take the moveable property which she received from her husband, because that was her peculiar property. The right of the husband endures over the immoveable estate which he gave to his wife; and on the death of the husband, all his sons by either wife are entitled to inherit it.

"To a woman, whose husband marries a second wife, let him give an equal sum, as a compensation for the supersession." "Or presented to her on her husband's marriage to another wife, (as also any other separate acquisition,) is denominated a woman's property."

"What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property."

"The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property."

"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate."

The texts quoted are those of *Yájnyawalcya, Náreda, Çatyáyana, Menu,* and *Vrihaspati.*

Zillah Purnea.

CASE IX.

Q. A Brahmin, being in possession of some moveable property consisting of cash, jewels, gold, silver, and other

effects, died, leaving a widow and a daughter. The widow bestowed all her husband's property of the above description on her daughter's husband. In this case, was the property a fit subject to be disposed of by the widow, and will it go to the donee in virtue of the gift?

A gift of personal property inherited by a widow to her daughter's husband, is good, though the daughter be living.

R. In default only of the widow, the daughter can inherit; consequently the gift made by the widow to her daughter's husband is good, and the donee is entitled to receive the property in virtue of the disposition in his favour.

Authorities.

The text of *Vyása*, cited in the *Dáyabhága*:—"What is presented to the husband of a daughter, goes to the woman, whether her husband live or die; and, after her death, descends to her offspring."*

City Dacca,
May 29th, 1818.

CASE X.

Q. A Hindu woman, about three or four hours previously to her death, and while she was in a state of extreme weakness, made a gift of her estate, consisting of lands and other property, to a stranger. In this case, is the gift complete and binding?

A gift by a woman of her own property to a stranger is good, if she have no heirs.

R. If there be neither issue nor any other heir of the woman, and the property given be not her husband's property, and if when she made the donation she was in the full possession of her mental faculties, the gift is legal and good*.

City Dacca,
February 24th, 1813.

* See remark on Case 39.

CASE XI.

Q. A *Byragee,* or religious mendicant, executed a deed of gift in favour of a person of his own order, by which he assigned over to him his entire property, moveable and immoveable, stipulating in the deed, that on his (the donor's) death, the donee should exercise proprietary right over the property given. The donee died before the donor, who continued in possession of the property during his lifetime, and some time afterwards died. Now the donee's pupil, who is by law considered as his heir, claims the property assigned. In this case, is such pupil entitled to the property in virtue of the deed drawn out in favour of his preceptor, or otherwise ?

A gift conditioned to take effect after the death of the donor, does not go to the heir of the donee, if the latter died before the former, unless expressly stipula-

R. Supposing the donor to have assigned his property, moveable and immoveable, to the mendicant (the donee) in this form, "that you will derive the right of ownership over my property after my death," and the donee to have died previously to the death of the donor, the donee's property had not accrued over the things given; and if there was no particular provision in the deed that the donee's heir should take, in case he died before the donor, the donee's pupil has no legal claim to such property.

Zillah Jungle Mehals,
March 29th, 1819.

CASE XII.

Circumstances under which a gift is invalidated.

Q. 1. What are the circumstances which render a gift null and void ?

R. 1. If a gift is made by a person under the influence of lust or anger, or having no title or ownership, or being grievously disordered or disturbed in mind, or intoxicated,

or during madness, or in pain, through mistake, or in jest, under impulse of fear, or afflicted with grief, or the like, such gift is considered null and void.

Authorities.

Catyáyana:—"What has been given by men under impulse of lust, or anger, or by such as are not their own masters, or by one diseased, or deprived of virility, or inebriated, or of unsound mind, or through mistake, or in jest, may be taken back*."

Q. 2. If a person, while afflicted by a sickness from which he died, made a gift of his property, being however at the time in full possession of his mental faculties, in this case, is the gift legal and valid?

A deathbed gift is valid.

R. 2. Notwithstanding the fact that the gift was made during a mortal illness, if the donor, at the time of his making the donation, was of sound mind, this gift is legal and valid†.

Q. 3. How long does the minority of a female continue?

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* There are other circumstances which operate to render gifts void, as the following.

What has been given by a minor, an ideot, a slave, or other person not his own master, or a decrepit old man, or one disabled, or an outcast, must be considered as ungiven. So must any thing given as a bribe, through any fraudulent practice, in consideration of work unperformed, or in excessive joy, in sport, to a bad man mistaken for a good one, or for any illegal act. The authorities for this opinion are laid down in the Digest, vol. ii. treating of void gifts.

† But see note to Case 39.

Minority extends to the end of fifteen years.

R. 3. The minority of a female continues until she has attained fifteen complete years of age.

Zillah Dinagepore, March 26th, 1814.

CASE XIII.

Q. Is a woman competent to make a gift to her son of her father's estate, consisting of lands and other property, which devolved on her by inheritance? Supposing her father's property to be in a state of joint tenancy with his coparcener, can she dispose of the property to the extent of her father's interest?

The gift by a coparcener of her share of the joint estate is valid, according to the law of Bengal.

R. If there be neither daughter nor daughter's son of her father, the woman is competent to give the property which she inherited from her parents to her son; and if given, the gift must be considered good and valid, even though the property given be joint and undivided. This opinion is conformable to the *Dáyabhága* and *Dáyatatwa.*

Authorities.

Dácsha :—" Presents given to a mother, a father, a spiritual teacher, a friend, a moral man, a benefactor, an indigent or unprotected person, and a learned man, are productive of benefit."

Náreda :—" If they severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts; for, surely, they have dominion over their own."

Zillah Nuddea, June 7th, 1817.

CASE XIV.

Q. A person purchased some real property with the produce of his ancestral lands, or with his hereditary annual allowance in money. In this case, is he, having sons and sons' sons, competent to give the whole or a part of such property, without their consent, to his daughter and sister's son for their subsistence, or to sell it to them?

The gift of part or the whole of landed property purchased with the produce of an ancestral estate is good and valid.

R. If the individual above alluded to purchased some landed property with the produce of lands descended to him from his ancestors, or with his annual pecuniary allowance, and give or sell a part or the whole of such estate (without the consent of his sons and son's sons) to his daughter and sister's son, he is competent to make such alienation, because the property given was purchased with the produce of the patrimonial estate, which does not constitute patrimony; and there is no prohibition recorded against gift by a father of the whole or a part of such property, as his family does not thereby suffer for maintenance, and he is independent with regard to such property. This opinion is consonant to the *Dáyabhága*, as current in Bengal.

Authorities.

Since here also it is said "the whole," this prohibition forbids the gift or other alienation of the whole, because immoveables and similar possessions are means of supporting the family. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family.

Zillah Beerbhoom.

CASE XV.

Q. 1. A family, consisting of three brothers, having come to a division of their ancestral moveable and immove-

able property, separated themselves from each other, and enjoyed their respective shares. Under these circumstances, is one of the brothers having a wife, a daughter, a daughter's son, and a childless widow of his son, without their consent, competent to give his landed estate to his two younger brothers? If consent be necessary in this case, whose consent is required?

According to the law of Bengal, a person may dispose of his entire portion of ancestral property, to the exclusion of his wife and daughters.

R. 1. If the associated brothers, having separated themselves from each other, live apart in the enjoyment of their respective shares of the patrimony, and one of them, during the lifetime of his wife, daughter, daughter's son, and son's childless widow, without their consent, give his own share to his two younger brothers, he is competent to do so, because he is master of his own share, and is by no means dependant in respect of it. This opinion is conformable to the *Dáyabhága* and other authorities current in Bengal.

Authorities.

"Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." The above text is of *Náreda,* cited in the *Dáyabhága,* &c.

Q. 2. If it were conditioned in the deed of gift, that the donees should supply the expense attendant on the donor's being carried to the river side, when at the point of death, also the expense attendant on his exequial rites, the maintenance of his son's childless widow, and should discharge all his debts; and if the donee fulfilled some of the conditions, leaving others unperformed; in this case, has the deed of gift validity or otherwise?

A conditional gift is rendered null and void by the omission of the donee to perform all the conditions stipulated by the donor.

R. 2. Supposing the donor to have conditioned in the deed of gift, that the donees should defray the necessary expenses of his being carried to the river side at the point of death, of his exequial rites, of the subsistence of his son's childless widow, and should also satisfy his debts, and the donees to have fulfilled the whole of the conditions as mentioned in the deed, then the instrument becomes binding; but not so, if the whole of the conditions are not fulfilled, in which case the deed of gift has no validity. In the case of a gift, the donor's will is predominant; and where all the conditions made by him in the deed of gift are not fulfilled by the donees, it is not followed by the creation of their property in the gift, as a conditional gift depends on the performance of its conditions, and when those are fulfilled, it becomes complete.

Authorities.

" For the will of the giver is the cause of property." *Dáyabhága.* " If the subject pay not revenue, the grant, being conditional, is annulled by the breach of the condition." *Vivádabhangárnava* and other authorities.

A deed of gift executed on a deathbed is valid.

Q. 3. Supposing the donor, during his illness, but in the full enjoyment of his faculties, to have executed the deed of gift; in this case, is it complete and binding ?

R. 3. Under the circumstances stated, the deed of gift must be considered good and valid*.

Authorities.

The following passage is cited in the *Vivádabhangárnava* and other tracts: " What has been given by men agitated with fear, lust, grief, or *the pain of* an incurable disease, &c. must be considered as ungiven."

Zillah Beerbhoom.

* But see note to Case 39.

CASE XVI.

A person died, leaving no heir down to the widow, and his property devolved on his daughter, who was the mother of male issue. Afterwards the daughter's son died, by which means she became a childless widowed daughter. She subsequently made a gift of her father's property to her childless widowed sister, and died. The latter took possession of the property. In this case, was the childless widowed daughter competent to give, sell, or make other alienation of the entire property, while her father's brother's son was living? and supposing such disposition to have been made, is it legal and binding, or otherwise?

A daughter is not competent to alienate property which had devolved on her from her father to the prejudice of the next heir.

R. Under the circumstances stated, the childless widowed daughter had only a right to the enjoyment of her father's property with moderation. Therefore the disposition by her was illegal. This is conformable to the *Dáyabhága* and other works.

City Dacca,
July 4th, 1816.

CASE XVII.

Q. 1. Is it lawful to make a gift of joint undivided property, whether real or personal, according to the law current in Tirhoot?

According to the law as current in Tirhoot, a gift of joint property is invalid.

R. 1. A gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's share; for property cannot be sold or given away until it is defined and ascertained, which cannot be done without a division.

Authorities.

"Partition *(vibhága)* is the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate." *Mitácshará.*

Q. 2. Is the *Birt Muhabrahminee,* or profits arising from the levy of sacrificial fees, a fit subject of transfer? and supposing such profits to be enjoyed jointly by several of the class of persons denominated *Maha Brahmins**, is it lawful for any one of the coparceners to transfer his share, either by sale or gift?

And *Birt* profits are unalienable.

R. 2. The profits of the *Birt Mahabrahminee* do not constitute a fit subject of transfer, and no one of the sharers in the joint profits of the *Birt* is at liberty to transfer to another person his own interest therein: even if the profits had been divided, the same prohibition would apply, inasmuch as the sacrificial fees, which constitute the *Birt,* are only fit to be received by the officiating priests, to whom they were offered; and the purpose of the offerings, namely, the spiritual welfare of deceased ancestors, would be defeated by the alienation.

Authorities.

"Having assembled eleven *Brahmins,* having invoked the manes of deceased ancestors, let him present to the *Brahmin* occupying the foremost seat, the couch, &c. belonging to the deceased." *Deva Yugnika,* cited in the *Nirnaya Sindhoo.* "Having sprinkled them with odoriferous perfumes, let him present to the sacrificer his father's

* Priests who attend at funerals: in some districts they are called *Mahabrahmin;* in others *Mahapatra, Agraháin, Pretiya, Cantaha,* &c. See note to page 61, vol. ii. Colebrooke's translation Digest Hindu Law.

wearing apparel, his ornaments, his sleeping couch," &c.
Vrihaspati, cited in the *Nirnaya Sindhoo*.

Sudder Dewanny Adawlut, May 14th, 1823.

Nundram and others, *v.* Kashee Pandee and others.

CASE XVIII.

Q. A person, previously to contracting a second marriage, executed an agreement in behalf of his eldest wife to the following effect: "You will exercise authority as proprietor over a *Guddee* (religious endowment) at Rudsetta, and I have no concern with it, and my second wife will have the right over the *Guddee* at Bahmun Gurh. If there be no issue (of mine), you will moreover have a ten-anna share of the *Guddee* at Bahmun Gurh, (which he assigned to the second wife,) and my second wife the remaining six-anna share." In this case, is the instrument, according to law, good and binding?

A man may give all his property to his two wives in unequal allotments, provided they each have enough for maintenance, and he have no other heirs.

R. The husband was the master of his own wealth, and has the power to give away his property, provided his family do not suffer on account of maintenance; consequently, if the produce of the six-anna share of the *Guddee* at Bahmun Gurh will suffice for the expenses attendant on his second wife's maintenance, and there be no issue, then the ten-anna share of the *Guddee* at Bahmun Gurh, which he, previously to contracting a second marriage, conditionally assigned by the agreement in favour of his eldest wife, will go to her (the eldest wife), and the agreement is good and binding.

Authorities.

The text of *Náreda*, quoted in the *Dáyabhága*: "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."

Vrihut Menu : "The support of persons who should be maintained, is the approved means of attaining heaven; but hell is the man's portion, if they suffer. Therefore let a master of a family carefully maintain them."

City Moorshedabad,
June 11*th*, 1818.

CASE XIX.

Q. A *Sudra*, having no male issue, and having disposed of his eldest daughter in marriage, makes a gift of his whole property, moveable and immoveable, while his maiden daughter and wife are living, to such eldest daughter, and then dies. In this case, is the donee entitled to exercise exclusive proprietary right over the property assigned by virtue of the deed of gift? and if so, is she at liberty to make a gift of a part of the property to her sister, and is such gift legal?

According to the law of Bengal, a gift of the entire property, moveable and immoveable, to a married daughter is legal, even though a wife and maiden daughter are in existence.

R. Supposing the *Sudra* who is destitute of male issue, but having a wife and a maiden daughter, to have given his whole estate, consisting of lands and other property, to his married eldest daughter, the gift must be considered good and legal. The authorities for this opinion are laid down in the *Dáyabhága.* "When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." *Náreda**.

* Though according to the law as current in Bengal, the father is competent to dispose of his whole property, provided there be neither son, nor son's son, nor son's grandson, yet he acts sinfully if he do so while a maiden daughter exists, whose initiatory ceremony (that is, marriage) is unperformed, or if his family suffer for the necessaries

Should the donee have bestowed a portion of the gift on her unmarried sister, that gift also must be considered complete and binding.

Authorities.

The texts of *Catyáyana,* cited in the *Dáyabhága:* " That which is received by a married woman or a maiden in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The independence of women who have received such gifts, is recognized in regard to that property; for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables."

From the doctrine quoted, it is clear that the donee was competent to make a gift of the property received from her father to her maiden sister. This is conformable to the *Dáyabhága, Dáyatatwa, Sricrishna Tercálancara,* and other legal authorities.

Zillah Mymunsing,
January 18th, 1823.

CASE XX.

Q. A person having a sister (mother of male issue or childless), can he, according to the law as current in Ben-

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of life. It is incumbent on a housekeeper to initiate his children and to support his family, and he who does not perform these duties is culpable, as expressly declared by *Menu:* " Reprehensible is the father who gives not *his daughter in marriage,* at the proper time, and the husband who approaches not *his wife* in due season: reprehensible also is the son who protects not his mother after the death of her lord."

gal, dispose of his ancestral landed estate by gift to a person paternally related to him? Supposing the proprietor to have died without making any alienation of his property, leaving no male issue, in this case, how will his property be distributed among his sister, sister's son, and his paternal relations?

The whole estate may be given away, though there is a sister and sister's son. The sister has no right of inheritance, but her son will inherit in default of heirs down to the brother's grandson.

R. There is no disabling provision in the law against a proprietor's alienation of his patrimonial immoveable property while his sister or sister's son exists; consequently the donor was competent to give his property to his paternal relation, and the gift is good and legal. Supposing the childless proprietor to have died without making any gift, leaving his sister, his sister's son, and his paternal relations; the sister, provided she be a maiden, is entitled to wealth sufficient to defray her nuptial expenses; but with exception to such allotment, she has no claim on her deceased brother's property. If there be no heir of the deceased down to his brother's grandson, the sister's son is entitled to inherit from him, for he confers a benefit on the deceased's ancestors by performing the double rites.

Authorities.

Náreda:—"Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."

"Though immoveables or *bipeds**," &c.

"Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the

* *Dáyabhága*, page 31.

gift or transfer is not null: for a fact cannot be altered by a hundred texts."

The right of a sister is denied by the following text.

"Riches were ordained for sacrifice. Therefore they should be allotted to persons who are concerned with religious duties; and not be assigned to women, to fools, and to people neglectful of holy obligation*.

By the mention of "women," must be understood all females, except the wife, daughter, mother, paternal grandmother, and father's grandmother of a person dying childless.

Dacca Court of Appeal,
June 21st, 1823.

CASE XXI.

Q. 1. An unassociated Hindu, before a large assembly of persons, verbally nominated the plaintiff as a fit subject to perform his exequial rites, and to take his entire property. In this case, is the plaintiff, after his death, entitled to succeed him?

A verbal gift property by an unassociated Hindu, on condition that the donee will perform his exequial rites, is good, on the death of the donor.

R. 1. Supposing the deceased to have appointed his relation's son (the plaintiff) to perform his exequial rites, and to have verbally made a gift in his favour; in this case the plaintiff, if he offer up the requisite oblations to the manes of the deceased, is entitled to succeed to his property.

* *Mitácshará*, page 329.

Q. 2. If there be the deceased's brothers of the whole blood or other relations living, have they any right to share the inheritance ?

R. 2. The brothers and other relations have no right to the succession, because the deceased was master of his own wealth of all sorts.

To the exclusion of the brothers of the donor.

Zillah Sylhet,
June 6th, 1812.

CASE XXII.

Q. A person brought an action, claiming a third part of a certain landed estate, against the purchaser of the land, and his brother who had sold it; and previously to the decision, the complainant assigned his interest in the property in dispute by a deed of gift to his minor nephew, who was the son of the selling brother. In this case, is the deed of gift complete and binding; and in virtue of the same, is the minor donee's guardian authorized to carry on the suit for the estate, as the complainant was to do ?

R. If it be proved that the complainant, in the full possession of his intellectual faculties, executed the deed of gift, disposing of his entire interest in the property in dispute, in favour of his minor nephew, and subsequently died, the deed of gift is, according to law, good and valid; and by virtue of such deed the minor donee's guardian, as manager of his affairs, may carry on the suit for the property in question.

A plaintiff may make a gift of the property he is suing for, and the guardian of the donee is thereby empowered to carry on the suit.

Calcutta Court of Appeal,
May 31st, 1821.

Premchand, *v.* Ramchander Bhoorja.

CASE XXIII.

Q. A person died, leaving no male issue, and was succeeded by his maiden daughter, who, subsequently to his death, married, and had a son in lawful wedlock, which son died leaving several sons. Some time after, the daughter of the original proprietor made a gift of her father's whole moveable and immoveable property to one of her son's sons, though there are her husband and other sons of her son living. In this case, is the gift legal?

Property which had devolved on a daughter, cannot by her be given to one son's son, to the exclusion of such grandson's brothers.

R. Under the circumstances above stated, the gift of the whole property made by the daughter, without the sanction of her son's other sons, must be held in law to be null and void.

Calcutta Court of Appeal, June 18th, 1812.

CASE XXIV.

Q. Is a person, having an uterine sister, competent to dispose of his ancestorial landed and other property by gift, in favour of a stranger? and if so, is his sister entitled to get her maintenance out of the property given?

Though his sister be living, a man may give away all his property to a stranger.

R. It is competent to a person to give away his patrimonial property, moveable and immoveable, though his uterine sister be living. If the sister be married, she has no right to have her maintenance out of the gift.

City Chinsurah.

CASE XXV.

Q. Is a *Brahmin,* whose eldest brother, leaving his ancestral and self-acquired property in a joint state with him, had entered into the order of a religious student, and is still living, competent to make a verbal gift of the whole undivided estate to his daughters, or otherwise?

R. When the eldest brother, having left the order of a housekeeper, entered into that of a religious student, his right to the paternal estate became extinct: therefore the gift of the undivided property made by the younger brother to his daughters is legal and valid.

Retirement from the world is civil death, according to the Hindu law.

Authorities.

The text of *Vasishtha,* as laid down in the *Retnácara* and other books of law: "They who have entered into another order, are debarred from shares."

Zillah Burdwan,
January 15*th,* 1817.

CASE XXVI.

Q. 1. Is a landed proprietor at liberty, having a son born in lawful wedlock, to bestow his whole or a portion of his landed estate by gift to his son by a woman of another class, or to a stranger, without the consent of his legitimate son?

R. 1. "Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them *should* not be *made* by him, unless convening all the sons."

Without the consent of his legitimate son, a man cannot alienate any part of his immoveable property.

"By favour of the father, clothes and ornaments are used, but immoveable property may not be consumed, even with the father's indulgence." "All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten; but should a true legitimate son be afterwards born, they have no right of primogeniture. Such among them as are of equal class (with the father), shall have a third part as their allotment: but those of a lower tribe must live dependant on him, supplied with food and raiment." "The legitimate son is the sole heir of his fa-

ther's estate : but, for the sake of pity, he should give a maintenance to the rest."

According to the above quoted texts of *Menu, Yájnyawalcya, Náreda,* and *Devala,* the father is incompetent to give, sell, mortgage, or make other alienation of his immoveables and bipeds, where a legitimate son is living, without his consent†. The father is competent to make a gift to his illegitimate son sufficient to provide him with food and raiment, though there be a legitimate son alive.

Q. 2. Subsequently to the death of the raja, his widow adopted a son, and put him in possession of all the property left by her husband. Shortly after, she, without the sanction of her adopted son, assigned a portion of the estate, by a deed of gift, to a stranger. In this case, is such gift legal and valid?

A widow having an adopted son cannot without his consent alienate any portion of the estate which belonged to her husband.

R. 2. "Let a childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, take her husband's share, and enjoy it with moderation until her death. She is not entitled to make a gift, mortgage, or sale of it."

"In childhood, must a female be dependant on her father; in youth, on her husband; her lord being dead, on her sons; *if she have no sons, on the near kinsman of her husband; if he* left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign: a woman must never seek independence."

"Though immoveables or bipeds," &c.

According to the doctrines of *Cátyayana* and *Yájnyawalcya,* the widow is incompetent to make a gift, mort-

† It will be observed, that this case was decided according to the law as current in Benares.

gage, or sale of any property, excepting such as she may have received from her affectionate kindred, without the sanction of her adopted son.

Bareilly Court of Appeal.

CASE XXVII.

Q. The complainant stated in her petition, that her husband's maternal grandfather, having been destitute of male issue, made over his whole ancestral landed estate by a deed of gift to his daughter, being her (the complainant's) mother-in-law, and died. The donee having taken possession of the gift, and enjoyed its produce for a considerable period, transferred it by gift to her son, the complainant's husband, who died, leaving two minor sons. Subsequently to his death, his mother died, on whose death the defendants dispossessed her (the complainant) and her sons from the property. The defendants answered, that the original proprietor died, leaving a widow and two daughters; that subsequently to his death, his widow came into possession of the landed estate; that on her death, her two daughters succeeded, but that the original proprietor had made no gift, as alleged, in favour of his elder daughter; that his second daughter had a son, whose death occurred prior to hers; that his elder daughter had two sons, (one being the complainant's husband,) which two sons died before her; and that, conformably to law, the property enjoyed by the original proprietor should have devolved on her paternal kinsmen. Under these circumstances, should the complainant's allegation be proved, is the gift legal or otherwise? If, on the other hand, the reply be considered proved by the depositions of the witnesses, will the property left by the elder daughter devolve on her son's sons and widow (the complainant), or on her father's kinsmen, the defendants?

Landed property acquired by gift from

R. Should it be proved that the original proprietor gave his entire estate, consisting of lands and other property, to

her father may be alienated by a woman, but not that to which she had succeeded by inheritance.

his elder daughter, and that she had bestowed it on her son (the complainant's husband), such gift must be considered legal, the gift by a female of immoveable property received from her father or affectionate kindred being recognized as valid in law. If, on the other hand, the original proprietor did not make the gift to his elder daughter, in this case, she was incompetent to alienate her father's property which had devolved on her by the law of inheritance, and the gift to her son is illegal. Supposing the elder daughter to have died after the death of her son (the complainant's husband), the succession goes to her paternal kindred (the defendants), to the entire exclusion of her son's sons and widow (the complainant).

Authorities.

"The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables."

"To the nearest kinsman, the inheritance next belongs."

Zillah Burdwan,
March 24th, 1821.

CASE XXVIII.

Q. A person, by recourse to law, recovered some of his father's acquired rent-free landed property which had been formerly lost, while his other brothers were living together with him and his father as an undivided and joint family, and the father verbally gave the property so recovered to the son who had recovered it, and the donee took possession of the same. In this case, is the donation, according to law, valid and good, or otherwise?

R. Should one of the brothers recover the patrimonial immoveable property which had been formerly lost or seized by strangers while the family was in an undivided state, the other brothers must give a fourth part of the land so recovered to him who retrieved it, in addition to his regular allotment. Here the property recovered was the father's self-acquisition, and the father voluntarily gave it to the recoverer: therefore the gift is legal. This opinion is conformable to the *Dáyatatwa* and other authorities.

According to the law of Bengal, a father may give all his self-acquired landed property to one of his sons.

Zillah Jungle Mehals,
June 19th, 1821.

CASE XXIX.

Q. A woman executed a deed of gift, in which she assigned her property, moveable and immoveable, to a person whom she educated and supported, and she (the donor) on the same date, and before the same company in whose presence the deed was executed, obtained an agreement from the donee, purporting, that while the donor lived the donee should support her, and not act contrary to her directions, on failure of which conditions the gift should be held null and void. The donee having got possession of a part of the immoveable property mentioned in the deed, and subsequently a dispute having arisen between the donor and donee, the former wishes to revoke the gift, and to recover possession of the property occupied by the donee. In this case, is the donor competent to recede from her former disposition, or not?

R. It appears in this case, that the woman having received an agreement from a person, purporting that he should support her until her death, and not deviate from her commands, gave to him her own estate, consisting of lands and other property, and that the donee did not fulfil the conditions stipulated. In this case, the donor is entitled

A gift may be taken back, on the donee's violation of the conditions annexed.

to take back the document from the donee, and to revoke the gift.

Zillah Chittagong, }
April 5th, 1816. }

CASE XXX.

Q. A woman made a gift of her property to her daughter and son-in-law, by a written instrument. In this case, is she (the donor) competent to revoke the gift, or otherwise?

Resumption of an unqualified gift unlawful.

R. No person is competent to revoke a gift lawfully made, and to resume possession of the property disposed of by the gift.

Zillah Chittagong, }
January 30th, 1816. }

CASE XXXI.

Q. A person having an uterine brother, executes an instrument in favour of his wife, in which he desires that she, on his death, should be allowed to make a gift or sale of his self-acquired property, moveable and immoveable, and dies without issue. In this case, is the widow entitled to dispose of the property mentioned in the deed, by gift or sale?

A widow in Bengal may, with the recorded permission of her husband, alienate his immoveable self-acquired property, although his brother is living.

R. Supposing the deceased to have left authority with his wife by a written instrument to make a gift or sale of his self-acquisitions, consisting of moveable and immoveable property, while his uterine brother was living, and to have died, leaving no heir down to the great-grandson, the widow, according to her husband's permission, is competent to give or sell the property in question. This is the received opinion.

Calcutta Court of Appeal.

CASE XXXII.

Q. A person of the *Brahminical* class disposed of his divided immoveable property by gift to his daughter, and then died. The donee remained about thirty-two years in undisturbed possession of the gift, but she was a childless widow. In this case, was she competent to make a gift of such property; or if she give it to her own *Purohit*, or family priest, is the gift complete and binding?

A woman may dispose of, at her pleasure, landed property acquired by gift from her father.

R. The childless widowed daughter has the power of giving the landed property which she received from her father, after her marriage, to a *Brahmin*, and the gift of such description of property made by her to her priest, is considered good and legal. The authorities for this opinion are laid down in the *Dáyabhága* and other legal works.

Authorities.

Catyáyana:—"That which is received by a married woman or a maiden, in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables. Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it, or to bestow it."

Zillah Hooghly,
January 16*th*, 1821.

CASE XXXIII.

Q. A fisherman's widow (there being at the time three sons of her contemporary wife living) made a gift of the whole of her self-acquired estate, consisting of a house and other property, to two *Brahmins*, for the purpose of pro-

moting her spiritual welfare: and having put the house into the possession of the donees, lived with them in it, and died while a son of her rival wife and his wife were residing in the same house. On her (the donor's) death, her step-son performed her exequial ceremonies, and then died. Now his (the step-son's) widow claims the house. Under these circumstances, is the gift good and valid?

A widow may dispose of, by gift or otherwise, as she pleases, the property earned by her own exertions.

R. Supposing the fisherman's widow to have acquired some wealth by her own personal exertions, and to have purchased the house with such acquisitions, and to have bestowed it on two *Brahmins* for her own spiritual welfare, and to have delivered the gift to them before her death, in that case, her property over it became extinct, and on the extinction of her right the donees' title accrued. The donees' right cannot be lost, even though the donor's rival wife's son and his wife lived in that house. The extinction of their (the donees') property can be occasioned only by their non-acceptance of the gift, or by their disposing of it by sale or other alienation. According to the doctrine of the *Dáyabhága* and other legal authorities, the step-son's widow cannot have any claim to the property, for she has no right over it, and the law admits the validity of a sale and gift made by a woman of the donations of her affectionate kindred and of other peculiar property.

Authorities.

The texts of *Nareda* and other legislators are quoted by the authors of the *Dáyabhága* and other works of law. "The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property." "The independence of women who have received such gifts, is recognized in regard to that property; for it was given by

their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated."

"In that which she has gained by the exercise of an art, such as painting or spinning, he is entitled to take it, even without the occurrence of any distress*."

Dacca Court of Appeal.

CASE XXXIV.

Q. Has a *Byragee,* or religious mendicant, the power of giving his whole property to his concubine, while his son by a female slave is living? and if so, is the donee authorized to make a gift of such property to a stranger? Has the son of the female slave, whom the mendicant expelled from his house, the right of inheritance, so long as his concubine (the donee) lives, or is he excluded?

The concubine of a *Byragee* may dispose of, at her pleasure, property given to her by him, though he have an illegitimate son, who would otherwise have been sole heir.

R. If the religious mendicant, at the time he made the donation to his concubine, was not under the influence of lust, anger, or other passion which has been declared sufficient to invalidate a gift, the gift must be considered legal and valid, because every person is master of his own wealth; but the donor acts sinfully by making a gift of his whole property, while any part of his family exist. The woman, however, neither obtained the property by inheritance, nor received it from her husband. She therefore may give it to a stranger. There subsists no property of the mendi-

* Property personally acquired by a woman does not, strictly speaking, fall under any one of the six descriptions of *Stridhun* or *peculium*, as enumerated by *Yájnyawalcya* or *Jimutavahana*, in as much as it is admitted that the husband's dominion extends over the earnings of her industry. See Digest, page 566, vol. iii. In this case, however, the husband was dead.

cant, after his disposal by gift of his entire estate in her favour; and the son of the female slave has no right to the property during the lifetime of the donee. If the donor, subsequently to the gift, should have acquired any estate, or if any property should have been reserved at the time of the gift, such will, on the death of the donor, according to the customs of religious mendicants, devolve on the son of the female slave. And even should the female slave have been expelled or degraded, her son, being free from natural defect, is entitled to the property earned subsequently to the gift, or reserved at the time thereof. This opinion is conformable to the *Dáyabhága, Smritisára, Vivádabhangárnava, Menu, Dáyatatwa,* and other legal authorities.

The text of *Vrihaspati,* cited in the *Dáyabhága:* " At his pleasure, he may give what he himself acquired."

" In the *Smritisára,* the validity of the donation is admitted: " A man's own gift is valid, because he has property, which is the established cause of validity. But it is not admitted that the religious purpose is attained, for he has not observed the commands of the law." *Vivádabhangárnava.*

Menu:—" The recitation of holy texts, and the sacrifice ordained by the lord of creatures, are used in marriages for the sake of procuring good fortunes to brides; but the first gift, or troth plighted, by the husband is the primary cause and origin of marital dominion."

The passages of *Yájnyawalcya* quoted in the *Dáyatátwa:*—" Even a son begotten by a *Sudra* on a female slave, may take a share by the father's choice; or after the death of the father, the brethren shall allot him half a share.

Should he have no brother, he shall take the whole, unless there be a daughter's son."

The *Vamana-purána*:—" A man should not neglect the approved customs of districts, the equitable rules of his family, or the *particular* laws of his race."

Zillah Nuddea,
April 9th, 1827.

CASE XXXV.

Q. A person having a wife and two daughters, made a verbal gift in favour of one of them of his whole ancestral landed and other property: in this case, is the gift legal or otherwise?

A man may give his whole property to one daughter, to the exclusion of his wife and another daughter.

R. Under the above circumstances, the gift orally made by the father to one of his daughters, though when he made the gift there were his wife and another daughter living, is legal and valid*.

Zillah Burdwan,
April 14th, 1821.

CASE XXXVI.

Q. 1. A person makes a gift of some immoveable property to his daughter's sons, who are under age, and live under his control. The donor keeps the property given in his own possession. Under these circumstances, should the gift be considered valid and binding, or otherwise?

A gift to a minor is valid, provided on his coming of age he exercise ownership over it.

R. 1. Supposing the donor to have bestowed the estate on the minor sons of his daughter, who are under his care and protection, and that he retained the property in his own possession during the donees' minority, in this case the gift is legal; but if, on the expiration of the donees'

† This, it should be observed, is a Bengal case.

minority, the donor continued to retain possession of the property, and the donees had not in any manner exercised ownership over it, the gift in such case is not valid or binding.

Q. 2. Supposing the donor above mentioned to have disposed of a small portion of his ancestral landed property also by a gift to his daughter's sons, without the consent of his own sons, is the gift of such property legal, or otherwise?

A man, without the consent of his sons, may give a small portion of his property to his daughter's sons.

R. Though the donor's sons may not have consented to the gift, yet he was authorized to give a small portion of the landed estate which descended to him, to his grandsons in the female line: consequently the gift is good and valid.

Zillah 24-Pergunnahs,
January 31st, 1810.

CASE XXXVII.

Q. A person of the *Brahminical* class, having separated himself from his brothers, while living apart from them, acquired thirty-one *beegahs* and eleven *cottahs* of rent-free land, and by succession to his son, he became proprietor of sixty-three *beegahs* and seven *cottahs* of the same description of landed property which the son had obtained by gift. Having enjoyed these estates for some time, he died, leaving a widow, who succeeded him; and she, while her husband's brother's sons were living, made a gift of a portion of the landed estate to her own brother. She mentioned in the deed of gift, that the land was bestowed for the spiritual benefit of her late husband. In this case, is the gift legal?

A widow may, for the spiritual benefit of her deceased husband, make

R. It does not appear from the question what quantity of the land was given; but the gift of a small part only of the estate, for the spiritual welfare of her deceased husband,

is legal; because, although it is laid down in the *Dáyabhága* and other books of law, that the widow of a deceased man who left no male issue, may only enjoy his property until her death, she is entitled to make a gift of a small part of it for the benefit of her husband, which if she do, the gift should be upheld as legal.

a gift of a small portion of his estate, to her own relation.

Zillah Dinagepoor,
April 15*th,* 1820.

CASE XXXVIII.

Q. A *Brahmin,* who had some rent-free lands and other property, died, leaving three sons, A, B, and C, and a daughter, D. The sons jointly enjoyed their father's property for some time, and the eldest of them (A) died, leaving a son and a daughter. The son of A took possession of his father's share, and died shortly afterwards, and on his death it devolved on his sister's son. The second son B died, leaving only a widow as his heir; and the younger son C, having supported B's widow, took possession of two shares; that is, one for himself, and the other for his deceased brother B. In this case, are C and B's widow competent, having assigned a small portion of their shares of the property in favour of their spiritual teacher, family priest, and of D's son, to give the remainder to the grandson of A? And if they have given their shares by a written instrument, is the deed of gift legal? and if not, who is entitled to succession?

R. Under the circumstances stated, the younger son C, and B's widow, were competent, having assigned a small portion of their respective shares to their spiritual teacher, family priest, and D's son, to give the remainder to A's grandson in the female line by a deed of gift, which deed must be considered legal. But if those persons had

Property may be given to a brother's daughter's son, to the exclusion of a sister's son; though, according to the law of inheritance, the lat-

ter would exclude the former.

died without making such gift, then the property would have devolved on the sister's son (D's son.)

Calcutta Court of Appeal.

Nundram, *v.* Ramtunoo Mookhorjea.

CASE XXXIX.

Q. A Hindu, having an uterine sister's son living, made over his entire estate, consisting of moveable and immoveable property, which he had acquired by dint of his own industry, by gift to a woman whom he kept as a concubine. At the time when the deed of gift was executed, he was afflicted by illness, which terminated in his death two days afterwards. In this case, is the gift legal; or supposing it to be void and illegal, will his entire property devolve on his sister's son?

The gift of a man's own acquisition is valid, though made on his deathbed, if he was of sound disposing mind at the time.

R. Supposing the person alluded to in the question to have made over his self-acquired real and personal estate by gift to his concubine while his uterine sister's son was living, and presuming him to have been, at the time when the deed was executed, of sound disposing mind, in that case the alienation is good and valid; otherwise it has no validity, and the sister's son will inherit*.

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† This opinion, and the one which preceded it to the like effect, must be received with some degree of qualification. It has been laid down as a general principle by Mr. Colebrooke, in his treatise on Obligations and Contracts, book iv. §§ 645, that "by the Hindu law, a gift or gratuitous contract, made by a person afflicted with an incurable distemper, is void. His equanimity being disturbed, he does not possess the self-control requisite to a valid act and legal disposal of his property." It follows, that to uphold a gift made on a deathbed, there should be the clearest proof of sound disposing mind, to repel any presumption which might exist to the contrary.

Menu says: "He may give it away at his pleasure, or he may defray his expenses with such wealth*."

Nâreda: "Though *generally* his own master, what a man does while disturbed from his natural state of *mind*, the wise have declared not done, because he is not *then* his own master."

Patna Court of Appeal.

CASE XL.

Q. A person, previously to his death, gave directions to his two wives that they should each accept a son in adoption. Subsequently to his death, his elder wife did not accept a son, and the two widows equally divided his estate. The elder widow made a gift of her whole share to a stranger, and died. Afterwards the younger widow received a boy in adoption. In this case, will the share of the elder widow go to the donee, or will it devolve on the adopted son of the younger widow?

A widow, having received instructions from her husband to adopt a son, and without doing so, making a gift to a stranger of the property which had devolved on her at her husband's death, such gift is invalid.

R. The son adopted by the younger widow with her husband's sanction, is entitled to the share of the elder widow, who infringed her husband's directions by omitting to make an adoption. The gift of the share which she received by participation with her rival wife is not legal, and the donee cannot take the property conveyed; because the adoption of a son is the only means in this case of preserving the libations of food and oblations of water at the funeral repast; and when she, without doing such benefit to her deceased husband, made the gift, she deserves to be ranked among those widows who are incompetent to succession. Consequently the gift by her is null and void.

Zillah Dinagepore,
August 31*st*, 1813.

† Not of *Menu*, but *Vrihaspati.*

CASE LXI.

Q. A certain *Rajpoot* made a gift of his entire property, real and personal, to his son, and put him in possession thereof; he himself going to reside in another place, where he contracted a debt. In this case, is it fit that the property given should be publicly sold for the satisfaction of the debt, while the debtor is living ?

The gift by a man of his whole property is unlawful and inoperative, as against a creditor.

R. The following opinion is consonant to the *Mitácshará, Menu,* and other law authorities. The text of *Náreda,* cited in the *Mitácshará:* " In civil affairs, the law of gift is four-fold; what may, or may not, be given, and what is, or is not, a valid gift."

" In distress for *the maintenance of* the family, *property* may be given away, except a wife or a son: but not the whole of a man's estate, if he have issue living: nor what he has promised to another." It is laid down by *Menu,* that only such property should be given away as remains after the food and clothing of the family have been provided for.

" *Menu* declared, that a father and mother, in their old age, a virtuous wife, and an infant son, must be maintained, even though doing, a hundred times, that which ought not to be done."

He again forbids the gift of the whole property by the text: " The ample support of those who are entitled to maintenance, is rewarded with *bliss in* heaven ; but hell is the portion of that man, whose *family* is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care."

The texts of *Dacsha,* cited in the *Viramitrodáya:* "Joint property, deposits for use, bailments in the form called *nyasa,* pledges, a wife, her property, deposits for delivery, bailments *in general,* and the whole of a man's estate, if he have issue alive, are things which the learned have declared unalienable, even in times of distress: the man who gives them away is a fool, and must expiate *the sin* by penance."

The prohibition as to gifts is declared by *Yájnyawalcya* to be made, lest, by the alienation, the family may suffer for want of maintenance. *Catyáyana* declares what may and may not be given: "Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, *whether fixed* or *moveable,* otherwise it may not be given."

Menu:—"When the judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction."

From the preceding authorities, it appears that the gift of the whole property was unlawful, as it involves a fraud upon the creditor; consequently the property fraudulently given must be sold for the liquidation of the debt. The gift of the whole property, even for religious observances, is prohibited; but an inquiry should be made, as to whether the debtor has any other property to satisfy the creditor's claim.

Zillah Furruckabad,
December 13*th*, 1818.

CASE XLII.

Q. A person, in the year 1207, F. S. executed a deed of gift of his landed property in favour of an individual,

whom he adopted as a *Kritrimapootra*, or son made, and the deed was duly attested with the seal of the *Kazee;* but a transfer of names was not effected in the collector's records. It does not clearly appear that the donee ever took possession of the property given. The donee, in the year 1215 F. S. died, leaving a widow in a state of pregnancy, who subsequently to his death brought forth a son. Shortly after the donee's death, the donor called upon the same *Kazee*, without giving any notice to his adopted son's widow, and having destroyed the deed of gift formerly drawn out by him, executed a deed of sale of a four-anna share of the same property to a third party, and a deed of gift of the remaining twelve-anna share to the donee's son, and got them duly attested with the *Kazee's* seal and signature. Shortly after, another individual instituted a suit against the donor, claiming the lands as his ancestral property. The donor confirmed his claim, and put him into possession of the property in question. Upon this, the widow of the original donee brought an action against the purchaser and the plaintiff above alluded to, with a view to recover possession of the whole sixteen-anna share of the property formerly conveyed by gift to her husband. It is satisfactorily proved, that the estate in question was exclusively the property of the donor, and that his confession of the claim of the party who sued him was merely the result of collusion to deprive others. In this case, are the widow of the original donee and her son competent to claim the whole property, in virtue of the deed of gift executed in favour of the deceased, or otherwise?

A gift once made cannot be resumed at the pleasure of the donor.

R. The word gift denotes the annihilation of the donor's property, and the creation of that of the donee. The property once given away cannot be resumed, and any subsequent alienation of such property is not consistent with the law.

Menu:—"Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say, 'I give:' these three are, by good men, done once for all, *and irrevocably*."

Secondly, as the donor adopted the donee by the *Kritrima* form of adoption, the latter is to be considered his son; for he is enumerated in the series comprising twelve descriptions of sons: consequently the donee was entitled to the property at all events, and his widow and son are moreover entitled to claim it in virtue of the gift, it having belonged exclusively to the donor.

City Patna,
August 20th, 1814.

Dyal Singh, *v.* Hoolea.

CASE XLIII.

Q. 1. A person having two daughters, a brother's son, and a son who was an outcast, verbally conferred his entire estate, consisting of moveable and immoveable property, on one of his daughters. In this case, is the gift good and legal?

A gift by a father of his entire property to one daughter, is legal, though he may have another daughter, and brother's son.

R. Supposing that the person alluded to, through paternal affection, verbally alienated his whole landed and other property to one of his daughters, while his other daughter, a nephew, and an outcast son were living, the alienation is legal, and the persons above named have no right to the property, as is laid down in a text of *Yájnyawalcya*: "They who know the law of gifts declare, that things once delivered as the price of goods sold, as wages, for the pleasure *of hearing poets, mucisians, or the like*, from natural affection, as an acknowledgment to a benefactor, as a nuptial gift to a bride *or her family*, and through

regard, cannot be resumed*." This is conformable to the *Mitácshará* and other authorities.

Q. 2. Supposing the gift to be illegal, and the outcast son dead, and that there are two daughters and a brother's son of the donor living, which of these survivors is entitled to the inheritance?

The other daughter, if unmarried, is entitled to have the expenses of her nuptials defrayed.

R. 2. Whatever property is given to a daughter, the gift is legal; for it ensures the production of benefits, as *Vyása* says: "A gift to a daughter is productive of an eternal enjoyment of benefit, and also to a brother."

The other survivors have no right of succession; and if the other daughter be a maiden, she is only entitled to such portion of the property as may suffice for the necessary expenses of her nuptial ceremony.

Zillah Agra,
March 9th, 1813.

CASE XLIV.

Q. A person, on the death of his son and wife, having reserved some landed property which descended to him from his forefathers, for the maintenance of his sisters and their sons, disposed of the remaining portion, by a deed of gift in favour of his spiritual teacher or his son, the deed being executed with the consent, and in the presence of his sisters, but not of their sons. In this case, is the gift legal?

The gift of a paternal estate is valid without the consent of sisters' sons.

R. Under the circumstances stated, the gift must be considered good and valid.

* This is not the text of *Yájnyawalcya*, but of *Náreda*. See Dig. vol. ii. p. 291.

According to the Hindu law, a man who has neither a son, nor a son's son, nor a great-grandson, is competent to give away his ancestral real estate, even though there be his other relations living: in this case, the sisters' or their sons' consent is superfluous.

Zillah Burdwan,
July 25th, 1823.

CASE XLV.

Q. A person died, leaving two sons, who having taken possession of their patrimonial estate, lived together as an undivided family. The elder brother, being destitute of children, adopted a son of his kinsman of the sixth degree in the paternal line, and died. Subsequently to his death, the adopted son lived with his uncle, being the brother of his adopting father, as an united and joint family. The second brother had no male issue, and made a gift of his property to his daughter's son. Now the adopted son claims the property left by the two brothers by right of inheritance; and the donee, being the second brother's grandson in the female line, claims also in virtue of the gift. Under these circumstances, to which of the claimants should the property go? If it go to both the claimants, to what proportion is each of them respectively entitled?

A man cannot make a gift of his property to a daughter's son, to the exclusion of the adopted son of an unseparated brother.

R. Should a person be succeeded by his two sons, the elder of whom, having no issue, adopts the son of a remote kinsman, and the second, on failure of a male child, executes a deed of gift, in which he assigns his whole property to his daughter's son, while his deceased brother's adopted son is living, and the estate and family are undivided and joint; in this case, the gift is illegal. When a man, who separated from his *coheirs,* and not reunited with them, dies leaving no male issue, his widow takes his whole estate; in default of her, his daughters inherit. The term "daughters" means both the daughter and daughter's son,

as *Yájnyawalcya* expresses it: "The wife and the daughters, &c." A son may take his adopting father's estate, and also the adopted son of an unseparated brother is entitled to inherit from his uncle.

Menu says: "Not brothers, nor parents, but sons, *if living, or their male issue,* are heirs to the deceased."

Zillah Sarun,
September 21*st*, 1810.

CASE XLVI.

Q. There were three brothers who held some landed property in coparcenary, one of whom died childless, leaving a widow, who succeeded to the share of her husband. Subsequently, the surviving brothers sold their entire estate, including the share to which the deceased was entitled, to a stranger. The widow applied to a court of justice for her husband's portion: a decree was passed in her favour, and she was put in possession of the property claimed. She then, notwithstanding that her husband's two brothers' sons and grandsons in the male line were alive, made a gift of the whole of her husband's property, which she recovered by litigation, to one of her husband's brothers' grandsons. In this case, has the gift validity or otherwise?

The fact of a widow's having recovered her husband's share by litigation, gives her no additional power over it.

R. Under the circumstances above stated, the widow was incompetent to give away her husband's whole property to one of his brothers' grandsons while there were his other nephews and their sons existing, and the gift must be considered illegal, as expressly declared by the following sages. *Catyáyaná:* "Let her enjoy with moderation the property until her death. After her, let the heirs take it." "Let the widow, preserving unsullied the bed of her lord, take his share; but she may not seek independency while she lives, to give, pledge, or sell it."

" Even in this case, if a partition should have been made, the widow is not entitled to the immoveable property."

CASE XLVII.

Q. A person having an adult son, without that son's consent, disposed of by gift to a stranger a part of his maternal grandfather's dependant landed estate, the *zemindar* or proprietor of which had dispossessed him, conditioning in the deed, that if he (the donee) could recover possession of the property, he might exercise proprietary right over it, and he (the donor) would have no concern with it. The donee having recovered the estate, in this case, is the deed of gift binding and legal? and if so, is the donor's son's property divested in virtue of the gift; or on the death of the donor, will his son acquire the right of ownership?

A person having a son may make a gift of his maternal grandfather's landed property which had been usurped, on condition of the donee's recovering it.

R. Under the circumstances stated, the donor was competent to give his maternal grandfather's immoveable property, which devolved on him by succession, to a stranger, and the right is complete and binding. There is no law that the daughter's son's son shall inherit; consequently the donor's son has no right to annul the gift. This opinion is conformable to the *Dáyabhága, Vivádachintamani, Dáyaruhasya,* and other works of law.

Authorities.

The text of *Vrihaspati,* cited in the *Vivádachintamani:* " Of houses and of land acquired by any of the seven modes of acquisition, whatever is given away should be delivered, distinguishing *land* as *it was* left by the father, or gained by the occupier himself. At his pleasure he may give what himself acquired. A pledge must be disposed of by the law of pledges, *or subject to redemp-*

tion; but of property acquired by marriage, or inherited from ancestors, not every gift subsists."

It is laid down in the *Dáyabhága,* that "Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null: for a fact cannot be altered by a hundred texts."

The passage of *Sancha,* quoted in the *Dáyaruhásya:* "Land inherited in regular succession, but which had been formerly lost, and which a single (heir) shall recover solely by his own labour, the rest may divide according to their due allotments, having first given him a fourth part."

CASE XLIX.

Q. A man dying, and leaving some landed property, a son begotten by him on a concubine got possession of that property, and died leaving no children. He was succeeded by a widow. Was she (the widow of the latter deceased person) competent to make a gift, sale, or other alienation of the property, while the daughter's son, or another concubine of the original proprietor, exists? If she should have made either of such dispositions, is it good and binding, or otherwise?

The son of a *Sudra* by a concubine or female slave, is entitled to inherit property, but his widow is incompetent to aliene to the prejudice of other heirs.

R. It is not particularly mentioned to what class the original proprietor belonged. If he was a *Sudra,* that is, of the fourth class, and the daughter whose son survives was begotten by him on a concubine, the widow of the son of his other concubine may enjoy the whole estate, whether consisting of real or personal property, during her lifetime, and she may also give or sell a small portion of it for the completion of her husband's funeral rites, or for his spiritual benefit, as well as for her own maintenance; but these

circumstances excepted, she is incompetent to dispose of the property inherited from her husband, and the gift of such property made by her must be considered void.

Authorities.

Thus in the *Mahabhárata*, in the chapter entitled *Dana-dharma*, it is said: " For women, the heritage of their husband is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth." "Even use should not be by wearing delicate apparel and similar luxuries: but, since a widow benefits her husband by the preservation of her person, the use of the property sufficient for that purpose is authorized. In like manner, (since the benefit of the husband is to be consulted,) even a gift or other alienation is permitted for the completion of her husband's funeral rites. Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property; or, if still unable, she may sell or otherwise aliene it: for the same reason is equally applicable." This opinion is declared in the *Dáyabhága*.

Catyáyana:—" Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

" Abiding with her venerable protector, that is, with her father-in-law or other of her husband's family, let her enjoy her husband's estate during her life, and not, as with her separate property, make a gift, mortgage, or sale of it, at her pleasure."

Náreda:—" When the husband is deceased, his kin are the guardians of his childless widow: in the disposal of the property and care of herself, as well as in her maintenance, they have full power."

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Yájnyawalcya :—" Even a son, begotten by a *Sudra* on a female slave, may take a share by the choice of the father; but if the father be dead, the brethren should make him partaker of half a share."

By the term, " a son begotten by a *Sudra* on a female slave," must be understood daughters, daughters' sons, and other heirs. This opinion is conformable to the *Dáyabhága, Dáyatatwa, Vivádachintámani, Mitácshará, Menu,* and other legal authorities*.

City Dacca,
May 1*st*, 1816.

CASE XLIX.

Q. 1. A Hindu *zemindar* dies childless, leaving a widow; who one day previous to her death, in full possession of her faculties, executed a will, or conditional deed of gift (duly signed and attested), of all the property, real and personal, with the profits accruing therefrom, to which she had succeeded on the death of her husband, together with the profits which had accrued therefrom, and all the property acquired by herself, in favour of a stranger. In this case, what property will pass by such will, or conditional deed of gift?

* In the case also of Bindrabun Chund Rai, *versus* Bishunchund Rai, where the respondent claimed to retain possession of certain lands on the plea of gift from a Hindu widow by whom they had been taken on her husband's death, on a division among the heirs, the court of Sudder Dewanny Adawlut held that the plea was not proved, and that at all events the gift would have been invalid without the consent of the heirs. Sudder Dewanny Adawlut Reports, vol. iv. page 143. And in another case, (page 117 of the same volume,) it was determined, that the widow of a Hindu, who died without children, had the power of making a gift of a portion of her late husband's property for his spiritual benefit; but such not appearing to the court to have been the object of the gift in the case in question, the claim of the donee was disallowed.

R. 1. Although the instrument in question may have been duly signed and attested, and executed by the widow while in the full possession of her faculties, still she was not competent, without the consent of her husband's heirs, and those on whom she was dependant, to make a conditional gift, stipulating for the possession of the donee after her death, nor was she at liberty to make a will affecting the landed and other property left by her husband, into the possession of which she came on his death, nor affecting the profits of it, nor affecting her own acquisitions made by means of the landed property to which she had succeeded, or by means of its profits. As, therefore, the gift or disposition by will of all three descriptions of property above named, (viz. landed property devolved on her from her husband, personal property, and her acquisitions made by means of the inherited estate, and its profits,) is illegal, no part of that property goes to the donee: but whatever the widow may have acquired by means, other than those of the inherited property and its profits, is her own *Stridhun*, or peculiar property, and she is at liberty, (except in the case of immoveable property given to her by her husband,) to dispose of such *Stridhun* by will or gift, as she pleases; and, therefore, the *Stridhun* of the widow, (except immoveable property given to her by her husband,) can pass to the stranger under the will or conditional deed of gift. This opinion is given in conformity to the *Dáyabhága*, *Sricrishna Tarcálancára's* commentary on the *Dáyabhága*, *Dáyatatwa*, *Dayaruhasia*, *Catyáyana*, *Menu*, and other authorities current in Orissa.

A widow cannot alienate, by gift or will, property devolved on her from her husband, nor her own acquisitions made by means of such property.

But she may dispose of her own peculiar property as she pleases, except such part of it as consists of *immoveable* property given to her by her *husband*.

Authorities.

1st. "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death: after her, let the heirs take it." Text of *Catyáyana*, cited in the *Dáyabhága*, *Dáyatatwa*, and other authorities.

2d. "Land passes by six formalities: by consent of townsmen, of kinsmen, of neighbours, and of heirs, and by gift of gold, and of water." Text of unknown origin, cited in the *Dáyatatwa,* and other authorities.

3d. "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power." Text of *Náreda,* cited in the *Dáyabhága,* and other authorities.

4th. "But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *Sapinda.*" Text of *Náreda,* cited in the *Dáyabhága* and other authorities.

5th. "In the disposal of property, by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons." *Jimutavahana* in the *Dáyabhága.*

6th. "As the dependance of women in making gifts is on their husband's relations, it is evident that she may make gifts to them with their consent." Commentary of *Sricrishna Tarcálancára.*

7th. "For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth." Here the term waste indicates that they are not at liberty to dispose of the property as they please, by gift, sale, or other means." Text of the *Mahabhárata,* cited in the *Dáyaruhasia.*

8th. "A gift, pledge, or sale of lands, houses, or slaves, by a dependant person, is invalid or inefficient." *Catyáyana.*

9th. "The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property. That which is received by a married woman, or by a maiden, in the house of her husband, or of her father, from her husband, or from her parents, is termed the gift of affectionate kindred. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of dominion and of sale, according to their pleasure, even in the case of immoveables." Texts of *Catyáyana*, cited in the *Dáyabhága*, *Dáyacramasangraha*, and other authorities.

10th. "What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property." Text of *Náreda*, cited in the *Dáyabhága*.

11th. "But in the case of immoveables bestowed on her by her husband, a woman has no power of alienation by gift or the like." *Jimutavahana* in the *Dáyabhága*.

12th. Gift consists in the effect of raising another's property.

Q. 2. In the event of such disposition being declared illegal and void, to whom will the widow's *Stridhun* go, supposing there to be descendants of her father or grandfather living? Will it go to them, or to the nephews or other heirs of her husband? An answer is required to be delivered to this question according to the law of Orissa.

R. 2. The instrument in question having been thus proved to be illegal and void, supposing there to be no descendants of the father or grandfather of the woman living, and she have no unmarried daughter, or affianced daughter,

nor married daughter, nor son, nor daughter's son, nor son's son, nor son's grandson, nor stepson, nor stepson's son, nor stepson's grandson, nor husband, nor mother, nor father, nor husband's younger brother, nor son of her husband's younger brother, nor son of her husband's elder brother, nor son of her sister, nor son of her husband's sister, the *Stridhun* will go to her brothers, or her brothers' sons, with reference to their propinquity, and not to the nephew or other heirs of her husband. This opinion is delivered in conformity to the *Dáyabhága, Dáyacramasangraha, Dáyatatwa,* and other authorities current in Orissa.

Stridhun will be inherited by the woman's brother or brother's son, to the exclusion of her husband's heirs.

Authorities.

1st. "The sister's fee belongs to the uterine brothers. After them it goes to the mother, and next to the father."

2d. "The mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son, and the rest, shall take their property." Text of *Vrihaspati,* cited in the *Dáyabhága, Dáyacramasangraha, Dayatatwa,* and other authorities.

Sudder Dewanny Adawlut,
July 12*th*, 1815.

Kundrup Singh, appellant, *v*. Mohunlol Khan, respondent.

CASE L.

Q. A proprietor of a ten-anna share of a landed estate had a son, who died before him, leaving a widow and three daughters. The said proprietor having brought the appellant from a certain place, gave him in marriage to one of his three grand-daughters, and presented him with his entire share of the property as a *Yautuca,* gift (property

given at a marriage), by a deed; and it is also proved that the appellant took possession of the property so given, and sold a two-anna share of it with the consent of his wife, which sale was admitted as good and valid by the decisions of the *zillah* and provincial courts. In this case, has the widow of the son of the donor a right to sell any portion of the remaining eight-anna share?

A man may give his entire property to the husband of one of the daughters of his deceased son as a *Yautuca*, or nuptial present, to the exclusion of his son's widow and other daughters.

R. It appears from the evidence adduced in this case, that the landed proprietor in question separated his portion of the estate from that of his coparceners, and caused it to be registered in his son's name; and that having brought the appellant from a distant place, he gave him in marriage to one of his three grand-daughters, presenting him with his entire estate as a *Yautuca*, or nuptial gift, while his own wife and his son's widow and two unmarried daughters were living; and that he died, leaving directions with the appellant to support his and his son's widows. Under these circumstances, the property which is specified in the deed of gift, according to law, being the appellant's estate, the deceased son's widow has no right over it, and cannot sell it. It also appears that the deed of gift was attested by three witnesses; consequently the donee's proprietary right to the estate specified in the deed being so established, the son's widow has no right to it, and therefore her claim is inadmissible.

Authorities.

Menu:—"After the (death of) father and mother, the brethren, being assembled, must divide equally the paternal estate: for they have not power over it while their parents live."

Vishnu:—"When a father separates his son from himself, his will regulates the division of his own acquired wealth."

Devala :—" For sons have not ownership while the father is alive and free from defect."

" But wealth received on account of marriage is considered to be that which has been accepted with a wife.".

Dacca Court of Appeal, *May*, 1820.

Jugunnath Das, *v.* Mudunmohun Ghose and others.

CHAPTER IX.

OF SLAVERY.



CASE I.

Q. A person living in service, was supposed by the inhabitants of the place to be the slave of the individual whom he served. In this case, is he to be treated as a slave, from the fact of such notoriety? and if so, is the master competent to dispose of him by sale ?

Slaves are of fifteen descriptions. Enumeration of them.

R. According to law, slaves are of fifteen descriptions; but it is not distinctly mentioned in the question to what sort of slavery the individual alluded to belonged. Of the fifteen descriptions of slaves, five are the following: one born of *a female slave* in the house of *her master (Grihajatá)*, one bought *(Krita,)* one received *by donation (Lubdha,)* one inherited from *ancestors (Kramagutá)*, and one self-sold *(Atmabikryá);* and the issue of these five slaves become the property of their master: the person whom they serve is competent to sell them, and they cannot be emancipated. The remaining ten are these: one maintained in famine, an apostate from religious mendicity, one *who has* offered *himself* in this form, "I am thine," one relieved from great debt, one pledged by a former master, one made captive in war, *a slave* won in a stake, one maintained in consideration of service, a slave for the sake of his bride, and a slave for a stipulated time: these ten can be emanci-

pated without the consent of their master. The passage of *Náreda,* as laid down in the *Vivádachintámani:* "Of those *slaves,* the first four *(one born in the house, one bought, one received, and one inherited)* are not of right released from slavery: unless they be *emancipated* by the indulgence of their masters, their servitude is hereditary. That low man who, being independent, sells himself, is the vilest of slaves; he also cannot be released from slavery."

City Dacca,
May 26th, 1824.

CASE II.

Q. A female slave being the property of two individuals, one of them disposed of her in marriage to the slave of another person, and ordered her to go to her husband's house, where she is still living. The other proprietor brought an action in a court of justice, claiming her. In this case, does the plaintiff's right consist over half her person, or is he entitled to half the price of her person?

One of two owners of a female slave giving her away in marriage, the other still retains his right to half her labour, or half her value.

R. Of two proprietors of the slave girl, if one disposed of her in marriage without the consent of his co-parcener, the person who did not consent is entitled to half the servitude of the slave girl, but not to half her person; and if he wish to get half the value of her person, he may recover it. This opinion is received by the learned.

Zillah Chittagong,
March 13th, 1818.

CASE III.

Q. A slave being the property of three individuals, one of them, with his own free will, emancipated him from servitude, to the extent of his legal share. In this case, is the slave released from his obligations to the other two proprietors; if not, how are the two remaining masters to claim their right of servitude?

R. Supposing one of the three proprietors to have emancipated the slave from servitude to the extent of his legal share, and the other two not to have done so, the right of the person who discharged him is divested by emancipation, but the property of the others cannot be destroyed by that transaction. The slave must serve those individuals who have not emancipated him, according to their shares in him.

The emancipation of a slave by one of three masters, does not render him free with respect to the other two.

Zillah Mymunsingh,
July 15th, 1813.

CASE IV.

Q. A female slave, having been emancipated from servitude, suffered much for the necessaries of life, and sold herself with her two daughters, one of them five, and the other seven years of age, with her late master's consent. In this case, is the sale of the daughters of such tender years available in law or not? Have the daughters an option, on attaining the age of majority, to set aside the sale of their persons?

R. If the slave, after having been emancipated, sold herself and her two minor daughters with her late master's sanction, the sale is legal, and the daughters, on attaining the age of majority, have no power to nullify the contract. This is the received opinion.

Children sold as slaves, are not entitled to their freedom on coming of age.

Zillah Chittagong,
July 19th, 1819.

CASE V.

Q. A person procures a contract of marriage to be entered into between his slave and the daughter of a free person, and subsequently sells his slave's wife to another. In this case, has the master of the slave derived any right of proprietorship over the person of the slave's wife, by rea-

son of her being subject to his slave; and is the sale of such woman allowable by law?

A free woman, by marrying a slave, becomes the slave of her husband's master.

R. A free woman becoming the wife of a slave, becomes a slave to her husband's master, who has full power to alienate her by sale, and the sale is good and valid.

Zillah Chittagong, *August 20th,* 1819.

CASE VI.

Q. Four brothers purchased a female slave, who subsequently brought forth a son and a daughter. Of the four brothers, one sold his property over the slaves to the other three, while the male slave was only eleven years old, and afterwards he (the slave) married a free woman, and then died. Of the three proprietors, two left no heir at their death, and one is survived by a son. In this case, is he (the brother's son) competent to sell the widow of the slave, or otherwise?

And on the death of her husband, may be sold by his master.

R. If there be no nearer heir of the deceased brothers, the brother's son is competent to sell the widow of the son of the female slave, because the nephew is by law entitled to succession. If he be not the next heir of the deceased proprietors, he can only sell his right over the slave's widow. The sale of slaves is admitted by the usage of the country, and by law.

Authorities.

Catyáyana says:—"A free woman, or one who is not a slave of the *same master, (for the word* adasi *may bear either sense,)* becoming the bride of the slave, also becomes a slave to *her husband's owner;* for her husband is her lord, and that lord is subject to a master."

Dacca Court of Appeal.

CASE VII.

Q. A slave having left his master's house, resided in another place, and supported himself by his own labour for the period of ten or twelve years, during which time his master neither sent for him nor required his attendance, though it was known to him where the slave was living. In this case, does it follow that the master has relinquished his right of property; or, on the other hand, is a sale of the slave made by the master under such circumstances valid and binding?

The property in a slave is lost by neglecting to claim him for more than twelve years.

R. Of the fifteen sorts of slaves, five only, that is to say, one born of a female slave in the house of her master, one received by donation, one self-sold, one inherited, and one bought, cannot be released until their master emancipates them. It appears in this case that the slave, for ten or twelve years, with the knowledge of his master, lived in another place, and supported himself by his own labour, and contracted marriage by means of funds acquired by his personal exertion; and that the master neither made any endeavours to bring the slave back to his service, nor defrayed the expenses incident to his maintenance. In this case, a forfeiture of his right of ownership over the slave necessarily follows; because not objecting is silent neglect, which constitutes the loss of all property (after the period above alluded to), with exception to that which is immoveable: and the sale is illegal*.

CASE VIII.

Q. An inhabitant of Sylhet wishes to sell his female slave and her family, consisting of four sons and a little

* The proprietary right to moveable property lapses after a period of ten years, provided there was wilful neglect on the part of the owner for that period; but not if his non-interference was unavoidable.

girl, for a fixed sum, to another person. The slaves make an application to the court, stating that they are willing to serve their own master, but that the latter, from enmity, has come to an understanding with the intended purchaser to have the family removed from the place of their nativity, and the individuals sold at separate places.

Can the slaves, according to the Hindu law as current in Sylhet, object to such a sale?

May they, in case their master is determined to part with them, select another person, whom they prefer to be their purchaser? Or may they purchase their own liberty, if they can raise the sum demanded?

Four sorts of slaves cannot effect their own emancipation.

R. From the purport of the above question, the slaves alluded to in it are understood to be of that description, among the fifteen sorts of slaves specified in the *shasters*, which is termed *Ǵrihajata,* or born in the house. Five of these descriptions of slaves, one born in the house, one bought, one received, one inherited, and the slave self-sold, are not released from slavery, unless they be emancipated by the indulgence of their masters. Now if the owner, being inclined to sell his slave, wish to alienate his right of service by selling for a sum fixed by himself, any of those five sorts of slaves (the son born in the house, &c.) in right of his ownership and free will, he can sell the slaves, although willing to serve him.

But they should not be consigned to misery by sale.

In the above case, if taking the price fixed by their master from the purchaser chosen by him would occasion great misery to the slaves, then the master's alienation of his slave born in the house, and the rest, by taking his fixed price for the slave from a purchaser chosen by the slave, or from any other purchaser, should be maintained under the adaptation to circumstances prescribed by the *shasters;*

for the master incurs no loss by receiving his fixed price for the slave, even from the purchaser chosen by the slave, or from any other purchaser.

But still the slave born in the house, and the others, can never be released from slavery by paying the price set upon them by their master from their own property; for the master's right of authority extends to the property of his slaves.

This *vyavastha* is in accordance with the *Vivádabhangárnava, Dáyacramasangraha, Dáyabhága,* and other works current in the district of Sylhet.

Authorities.

1st. The following text of *Náreda,* cited in the *Vivádabhangárnava* and *Dáyacramasangraha:* " One born in the house, one bought, one received by donation, one inherited from ancestors, one maintained in a famine, one pledged by a former master, one relieved from great debt, one made captive in war, a slave won in a stake, one who has offered himself in this form, 'I am thine,' an apostate from religious mendicity, a slave for a stipulated time, one maintained in consideration of service, a slave for the sake of his bride, and one self-sold, are fifteen slaves declared by the law."

2d. This interpretation is in the *Dáyacramasangraha.*

" One born in the house," is, one born of a slave girl."

3d. The following passage in the *Dáyacramasangraha.*

" Among these slaves, the first four (one born in the house, &c.) and the slaves self-sold, cannot of right be released from slavery, unless they are emancipated by the indulgence of their masters."

4th. The following text of *Vrihaspati,* quoted in the *Vyavahâratatwa* and other tracts.

" Judgment is not to be formed, relying on the *shaster* alone; for a failure of justice is produced when an inquiry is not adapted to circumstances."

5th. This text of *Menu,* cited in the *Vidádabhangár-nava, Dáyabhága, Dàyatatwa,* and other works.

" Three persons, a wife, a son, and a slave, are declared by the law to have in general no wealth exclusively their own: the wealth which they earn is regularly acquired for the man to whom they belong.*"

Zillah Sylhet,
June 13*th,* 1825.

* This case was referred for the consideration and orders of the superior court by the magistrate of Sylhet, accompanied by the following statement. " A person possesses a slave, and sells him to another person for a sum of money. The slave admits that he is the slave of the seller, but presents a petition to the magistrate, saying that he is unwilling to remain as the property of the purchaser, and he prays that the magistrate will allow him to buy his liberty from the latter at the same sum the purchaser was to give, and thereby be absolved from slavery. Is the magistrate at liberty to act accordingly? The purchaser objects to the slave being able to effect this, and insists on the purchase being valid, and on his right of retaining the slave. It appears but just, that as the original seller's object in disposing of the slave was money, if the slave has it in his power to liberate himself from bondage, the magistrate should have a right to interfere, and thereby prevent the slave from being in the possession of a person to whom he objects." To this reference, after taking the opinion of their law officers as above, the court replied to the following effect:—" From the *vyavastha* of their law officers, the court are of opinion, that the slaves whom it is proposed to sell to one whose intentions they suspect and dread, may be allowed to select a purchaser with whom they are satisfied, and that in this their proprietors must acquiesce. The

CASE IX.

Q. 1. What descriptions of slaves are authorized by the Hindu law?

R. 1. There are fifteen descriptions of slaves: as follows.

1st. *Grihajata,* one born of a female slave in the house of her master. **Birth.**

2d. *Kreeta,* one purchased from his former owner for a sum of money. **Purchase.**

3d. *Lubdha,* one received in donation. **Donation.**

4th. *Dayadopaguta,* one acquired by inheritance. **Inheritance.**

5th. *Anakulabhritta,* one maintained in a time of scarcity or famine. **Maintenance during famine.**

6th. *Ahita,* one received in pledge. **Pledge.**

7th. *Rinadasa,* a distressed debtor voluntarily engaging to serve his creditor for a stipulated period. **Debt.**

8th. *Joodhaprapta,* one made captive in war. **Conquest.**

9th. *Punajita,* one won in a stake or gaming wager. **Won in a stake.**

10th. *Oopagata,* one offering himself as a slave, without any compensation, and saying, "I am thine." **Voluntary surrender.**

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answer, however, does not go the length of stating that slaves are competent to purchase their freedom from their masters against the consent of the latter. This doctrine corresponds with what has been laid down by Puffendorf on the same subject, (book vi. chap. 3, §§ 4:) "Nor doth it appear that he can transmit them to another master without their consent, they being really in the capacity of perpetual mercenaries or hirelings, working for the advantage of him that employs them, whilst continuing in that state, but not at his disposal when obliged to leave it."

Desertion from a religious order.

11th. *Prubrujeabusita,* an apostate from religious mendicity, who deviates from the rules of the order he may have voluntarily entered, and who thereby becomes the slave of the king.

Servitude for a stipulated period.

12th. *Kritakala,* one offering himself in servitude for a stipulated period.

Ditto for the sake of maintenance.

13th. *Bhuktadasa,* one offering himself in servitude for the sake of maintenance.

Ditto for the sake of a bride.

14th. *Burrubabhritta,* one becoming a slave for the sake of marrying a slave girl.

Voluntary sale.

15. *Atma Vikryee,* one who sells himself for a pecuniary consideration.

The above fifteen sorts of slaves have been enumerated by *Náreda* and *Menu* in the *Mitácshará, Ratnácara, Vivádachintámani, Calpataru, Smritisára, Vivádatandava, Smriti Sumoochuya, Madhaveeya,* and other legal authorities.

Q. 2. What legal powers are the owners of slaves allowed to exercise upon the persons of their slaves, and particularly of their female slaves ?

Duties to be performed by slaves, and penalties for omitting them.

R. 2. The owner of a male or female slave may require of such slave the performance of impure work, such as cleaning the house, the gate-way, the necessary, and the road, removing the dirt and rubbish, and all other impurities: attending the master at his pleasure, and rubbing his limbs. This is to be considered as impure work, and all other work as pure.

In case of disobedience or fault committed by the slave, the master is empowered to correct him by the infliction of

corporal punishment with a rope, or the small shoot of a cane, or by ignominious exposure. But if the master should exceed this extent of his authority, and inflict punishment upon his slave of a severer nature than that above stated, he is liable to be fined at the discretion of the ruling power. This is conformable to the opinion of *Catyáyana* cited in the *Ratnácara, Vivádachintámani,* and other authorities.

Q. 2. What offences upon the persons of slaves, and particularly of female slaves, committed by their owners, or by others, are legally punishable, and in what manner?

Penalty in case the master exceeds his power.

R. 3. A master has no right to command either his male or female slave to perform any other duties besides those specified in the answer to the second question, nor has he any authority to punish his slave further than in the mode that has been already stated. If he does so, he is liable to a pecuniary fine at the discretion of the ruling power.

Q. 4. Are slaves entitled to emancipation upon any, and what maltreatment? And may the courts of justice adjudge their emancipation upon proof of such maltreatment? In particular, may such judgment be passed upon proof that a female slave has, during her minority, been prostituted by her master or mistress? or that any attempt of violence has been made upon her person by her owner?

Cases in which the ruling power may compel emancipation.

R. 4. The commission of offences of the above nature by the master does not affect the state of bondage of the slave, and the ruling power has not therefore the right of granting his manumission. But if it should be proved that any person having stolen or inveigled away, by fraud and treachery, a child, and afterwards sold it to another, or that any person had compelled another into a state of

slavery by force or violence, the ruling power may then order the emancipation of such slave; and if a master, or any other person by permission of the master, should cohabit with a slave girl, before she had arrived at years of maturity, the ruling power may sentence such offender to pay a pecuniary fine, but cannot emancipate the slave girl. Whenever a slave girl has borne a child by her master, such slave, together with the child, becomes free, and the ruling power should sanction their emancipation. This is the law according to *Menu, Yájnyawalcya,* and *Catyáyana* cited in the *Mitácsharà* and other authorities.

Sudder Dewanny Adawlut,
March 29th, 1809.

CHAPTER X.

OF DEBT.



CASE I.

Q. A person died involved in debt, leaving some property, but not sufficient to answer all legal demands. His three minor sons and his widow took possession of the assets of the deceased's estate. In this case, are the individuals in question bound to liquidate the debts contracted by him?

The heirs who take the assets, are bound to discharge the debts of the deceased.

R. If the assets of the estate have been taken by the widow of the deceased and his sons, they are bound to pay his debts. It is incumbent on a son to exonerate his father by liquidating his debts, and this should be done before any partition of the paternal estate among the sons. The minor sons cannot exercise any power over the patrimony until they come of age, but then the liquidation of the father's debts becomes incumbent on them also. If the widow succeed to the estate, she should discharge the debts; but if the amount of the debt be larger than the property is capable of satisfying, the whole property which the deceased left must be given to the creditors, and then his heirs must be considered as absolved also from all claims.

Ramrutun Dos, *v.* Rajoo and others.

CASE II.

Q. A woman whose husband is living, executes a bond or similar obligation in her own name: in this case, is such instrument valid, and binding on the husband.

Certain descriptions of women competent to contract obligations for which their husbands are answerable.

R. It is a general principle in law, that a wife is incompetent to contract a debt, or to execute any obligation; but if a debt be contracted by a woman of any of the superior tribes, such as a *Brahminee* or a *C'shatria*, for the support of the family, it must be liquidated by the husband. A husband, however, is liable for any debt contracted by his wife, she being a woman of certain of the inferior classes, such as a milkwoman, &c. whatever may have been the purpose for which the money was borrowed, because the whole of their concerns is under the management of their wives.

Authorities.

The text of *Yájnyawalcya* laid down in the *Mitácsharà:*—"Neither shall a wife or mother *be in general compelled* to pay a debt contracted by her husband or son, nor a father to pay a debt contracted by his son, unless it were for the behoof of the family: nor a husband to pay a debt contracted by his wife."

The passage of *Vishnu* quoted in the *Viramitrodaya:* "Neither shall a wife or mother *be in general compelled* to pay the debt of her husband or son, nor the husband or son to pay the debt of his wife or mother."

Vrihaspati:—"A house-keeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family *during his absence.*"

Náreda:—"Whatever debt has been contracted for the use of the family by a pupil, an apprentice, a slave, a wife, or an agent, must be paid by the head of the family."

Menu:—"Should even a slave make a contract *in the name of his absent master* for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it."

Yájnyawalcya:—If the wife of a herdsman, a vintner, a dancer, a washerman, or a hunter, contract a debt, the husband shall pay it; because his livelihood chiefly depends on the labour of such wife."

Catyáyana:—"The husband, being a vintner, hunter, or fowler, a washerman, a herdsman, a shepherd, or the like, shall pay the debt of his wife: it was contracted in the concerns of the husband*."

Zillah Ghazeepore.

CASE III.

Q. A father with his five sons lived jointly in respect of food and in the conduct of mercantile affairs. One of the sons contracted a debt for his own private use, and not on account of the joint concern. On the expiration of

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* The Hindoo law in this particular seems to be in unison with the principles of English jurisprudence. "A married woman set over the affairs of the household; or of the whole or any portion of her husband's business or trade, binds him by the contracts which she makes respecting matters committed to her management. He is considered to contract through her ministry. In this case, likewise, as well as in the case of necessaries supplied by the wife, there is no rescission at her husband's instance or her own, for want of his special and express sanction."—Colebrooke's Treatise on Obligations and Contracts, Part 1st. page 233.

the period agreed upon for the discharge of the debt, the creditor brought an action against the debtor, who subsequently died before his father and four brothers, leaving a widow. The father and brothers of the deceased are enjoying the joint property. In this case, should the debt be liquidated out of the joint funds of the concern?

The survivors are answerable for a debt contracted by their deceased partner, if the sum borrowed was applied to their use.

R. Supposing the debtor living with his father and brothers as a joint family, and having joint dealings with them, to have contracted the debt for his private use*, and that the produce of the land or other estate purchased with the sum borrowed was expended for the use of the joint family or joint trade, then the father and brothers who jointly possess the ancestral and acquired property should liquidate the debt. But according to the doctrines of *Menu,* the *Mitácshará, Vivádachintámani, Vivádárnavasetu,* and other legal authorities, debts contracted for the following purposes will not be claimable from them. *Vrihaspati:* "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath, or sums for which he was a surety, *except in the cases before mentioned;* or a fine, or toll, or the balance of either."

Zillah Junglemehals,
May 7th, 1822.

CASE IV.

Q. A married woman having borrowed some money from a stranger, appropriated the sum so borrowed to de-

* This appears to be only half an answer to the query; for it is unquestionable, that the brothers who took the estate are liable for the debts, as far as there may be assets, whether the money was borrowed by the deceased brother for his private use alone, or was expended for the benefit of the family at large.

fraying the expenses of an action instituted by her for the recovery of her husband's property, and obtained a decree for the same in a court of justice. She executed a bond in favour of the lender for the sum borrowed, conditioning that "her husband should make over to him possession of the property for which she had obtained a decree in her own name, in the event of non-payment of the money borrowed by means of which it had been recovered." When this bond was executed, her husband was absent. Subsequently the lender, in virtue of the bond, brought an action against the borrower of the money, and against her husband, the possessor of the property specified in the bond. The borrower, in her reply to the plaint, acknowledged her execution of the bond and her receipt of the money, but pleaded that the property in question was in her husband's possession; and the other defendant answered by a total denial of the claim, and stated, that his wife had formed a connexion with the plaintiff, in consequence of which, he had, previously to the institution of this suit, filed a complaint against the plaintiff in the Foujdaree court; that the magistrate had passed a decision in his favour, ordering his wife to be delivered up to him, and that she was conspiring with the plaintiff to defraud him of his lawful property. In this case, according to law, will the liquidation of the debt be incumbent both on the borrower and on her husband jointly, or only on the former?

When a wife manages her husband's affairs, he is liable for the debts she contracts.

R. It is laid down in the *Mitácsharà* and other authorities, that when wives, who, with the consent of their husband, assume the management of his family affairs, contract a debt, the liquidation of such debt rests with the husband; otherwise he is not answerable for it.

Zillah Moradabad,
Aug. *24th,* 1810.

Buksheeram, *v.* Musst. Durboo and another.

CASE V.

Q. A man living with his brothers, as a joint and undivided family, borrowed a certain sum of money, and executed a bond, obliging himself to pay the debts by instalments. He (the debtor) proceeded to a distant country without liquidating the debt, while the family was undivided, and for the period of nine years no intelligence of him has been received. Now the debtor's brothers and wife are in the joint enjoyment of the family property, moveable and immoveable. In this case, can the creditor claim payment of his debt from the occupiers of the debtor's estate, or must the claim be deferred until the expiration of twelve years from the date on which the debtor departed from his family house?

The debts of a missing person must be paid by those in possession of his estate, without waiting twelve years for his re-appearance.

R. If a man contract a debt while he lives with his brothers, as an undivided and united family, and subsequently become missing, the debtor's brothers and wife who possess his estate must pay his debts, without waiting for the expiration of twelve years.

Authorities.

Yájnyawalcya :—" If one of *two or more parceners* or undivided kinsmen contract a debt for the support of his family, and either die, or be very long absent abroad, the other parceners or joint tenants shall pay it."

" A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge."

Náreda :—" The creditor need not wait a specific time; for there is no authority *for such a supposition.*"

Zillah Tipperah,
July 16*th*, 1812.

CASE VI.

Q. A creditor, on the death of a debtor, sues his heirs, namely, his widow and brothers; but it is not conditioned in the bond that the debtor's heirs and representatives shall discharge the debt. In this case, are the heirs of the debtor bound to liquidate that debt or not?

The heir who takes the assets of a deceased debtor, must satisfy his creditors, as far as the assets go.

R. If the deceased debtor should have *bonâ fide* borrowed the sum mentioned in the obligation, his widow must fulfil the conditions, provided she was a party to the contract, or promised to discharge the debt, or provided she received his assets, even though there be no mention of the heir's responsibility for the payment. If one of the associated brothers contract debts for the support of the joint family, the other parceners must discharge them. This opinion is consonant to law*.

Zillah Jessore.

CASE VII.

Q. A person died, leaving a widow, who succeeded to his estate, subject to the law which allows her only to enjoy the property with moderation until her death, but not to give or sell it; and having contracted a debt, either to save the property left by her husband or for other purposes, died without liquidating such debt, leaving her husband's brother and brother's son claimants to the property. Her husband's brother took possession of the property, and the other brother's son obtained a decree for a moiety of the same. In this case, will the liquidation of the debt rest with the brother and the brother's son of her husband?

Circumstances under which the husband's heirs are liable for a debt contracted by his widow.

R. Supposing the proprietor's widow, who succeeded him, to have contracted the debt for the payment of rent due

* In the Hindu law, family partnership induces a joint and several obligation.—Colebrooke, Obl. and Cont. Part I. Book 3. §§ 368.

to Government, or other necessary disbursements to save the estate, or for the purpose of promoting her husband's spiritual welfare, or for the support of the family, or for the due execution of any conditions made by her husband, and to have died prior to the liquidation of such debt, the proprietor's heirs, that is, his brother and brother's son, are bound to discharge the debt. And if the amount was borrowed for the purpose of being appropriated to any other purposes than those specified, such debt must be satisfied by him who becomes possessed of her jewels and other moveable property. This opinion is conformable to the *Dáyabhága, Mitácshará, Vivádachintámani, Dipacalica,* and other legal authorities.

Authorities.

The text of *Náreda* cited in the *Dáyabhága* :—" What remains of the paternal inheritance over and above the father's obligations, and after payment of his debts, may be divided by the brethren, so that their father continue not a debtor."

The necessity of liquidating the debt is recognized by the text of *Goutama* cited in the *Mitácshará* :—" He who takes the assets of a man leaving no male issue, must pay the sum due *by him* ;" and by the text of *Vrihaspati* laid down in the *Vivádachintámuni* :—" A father being dead, his sons, whether after partition or before it, shall discharge his debt, in proportion to their shares; or that son alone, who has taken the burden upon himself*."

In the *Dipacalica-Menu* :—"If the debtor be dead, and if the money borrowed was expended for the use of his family, it must be paid by the family, divided or undivided, out

* This is not the text of *Vrihaspati*, but of *Náreda*, in Digest, vol. i. page 275.

of their own estate." By the term "father," mentioned in all the texts, it must be understood, the father and others.

The debts which are not to be chargeable are noticed in the *Vivádachintámani* :—" A son need not pay in this world money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor any thing idly promised."

Dacca Court of Appeal,
May 29th, 1820.

CASE VIII.

Q. A *Sudra* became surety for a person of his own class, to whom a sum of money had been lent, and died previously to the liquidation of the debt. In this case, is the creditor entitled to realize the debt out of the deceased surety's property?

The estate of a deceased surety, is not liable for the debts of his principal: but *quere?*

R. The creditor cannot realize his debt out of the deceased surety's property, even though payment should not have been made by the debtor. This is the received opinion*.

Zillah Chittagong,
September 25th, 1820.

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* It is not distinctly stated what description of surety was meant, though from the terms of the question it may be apprehended that security for the loan was intended. Supposing this to be the case, the heirs are answerable, and the reply to the question is erroneous. According to the Hindu law, there are three sorts of accessary obligations, the *Prutyiya Prutibhoo, Dana Prutibhoo,* and *Durshuna Prutibhoo.* The first signifies a security for the purpose of confidence, and his undertaking is that which has been described by Mr. Colebrooke as a "*Mandate,* or precedent undertaking of a *mandant* for another's benefit, bidding one trust another, lend him money, allow him credit, manage business for him, or become answerable for his default." The second is that which he terms "*constitute,* or subsequent undertaking of a person,

CASE IX.

Q. A son, being in a state of union with his father as a joint family, died, and no property of the son came into the father's hands. In this case, is the liquidation of a debt contracted by the son incumbent on the father, or not?

Circumstances under which a father must pay a debt contracted by his deceased son.

R. Supposing the son to have died childless, and involved in debt while the family were undivided, and the father not to have received any assets belonging to his son, he is not in this case bound to liquidate the debt, unless the debt were contracted by the son for the purpose of the family support, or for the conduct of religious observances which were incumbent on the family; or unless the father, after the debt was contracted, promised to satisfy the claim of his son's creditor, in which cases the liquidation of the debt becomes incumbent on the father.

Zillah Aligurh,
April 15*th*, 1818.

CASE X.

Q. A person having borrowed a sum of money, established a shop with the said money, and then died. Subsequently to his death, his father and brothers appropriated all the goods that were in the shop. In this case, is the

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who engages to pay a subsisting debt, or fulfil an existing obligation of a third party."—Colebrooke, Obl. and Cont. Chap. x. Section 282. It signifies a surety for payment. The third signifies a surety for appearance, and answers to the Persian term *Hazirzamin*, the obligor undertaking to produce the person of the principal, in the event of his not being forthcoming. In the first and last mentioned sort of engagement, the death of the contracting party extinguishes the obligation; but in the second case, the obligation devolves on the representatives of the deceased surety.—See Colebrooke, cited in *Elem. Hindu Law*, Appendix X. p. 463 and 464.

satisfaction of the debt contracted by the deceased incumbent on his father and brothers, or not? And supposing the debtor to have left a widow, who took no part of the property left in the shop, is she nevertheless responsible for his debt, or otherwise?

R. Under the circumstances stated, the debtor's father and brothers are bound to liquidate his debt, but his widow cannot be held liable for it.

Those who take the property of the deceased are bound to liquidate his debts.

Authorities.

The text of *Yájnyawalcya*, cited in the *Mitácshará* and other books of law:—" If one of *two or more parceners or* undivided kinsmen contract a debt for the support of his family, and either die, or be very long absent abroad, the other parceners or joint tenants shall pay it."

CASE XI.

Q. A man dies involved in debt, and is survived by two minor sons, the elder of whom is only thirteen years of age, and there is no adult representative of the deceased. If any person bring an action against the minors, that action, according to the privileges conferred by the regulations of Government, and to the established usage of the country, cannot be admitted; and it has been provided, that minority continues until the completion of eighteen years of age, after which period majority commences. In this case, according to the Hindu law, is an action brought against the elder son of the deceased debtor admissible or not? And does the liquidation of the debt contracted by the father become incumbent on him?

R. According to law, the action for debt brought against the elder son of the deceased debtor, who is only thirteen years old, is not admissible. When the minor

Neither the property nor person of a minor is liable for

the debt of his ancestor. may attain the age of majority, he must discharge the debt contracted by the father, and not previously*.

Zillah Midnapore.

CASE XII.

Q. A person having contracted a debt, becomes a recluse; that is, enters into the order of an ascetic. His ancestral landed property falls into the hands of his brother's representatives. In this case, can the creditor realize his debt out of such property?

The debts of an ascetic follow his assets in the hands of his representatives.

R. If the individual in question borrowed a sum of money, and relinquished the order of a housekeeper, leaving a patrimonial immoveable estate in the possession of his relatives, in this case, those relatives who are in the enjoyment of his property are liable for the debt; and if they do not liquidate it, the creditor is competent to recover his money due from the debtor out of his property, as *Yájnyawalcya* propounds: "He who has received the estate of a proprietor leaving no son *capable of business*, must pay the debts *of the estate*, or, on failure of him, the person who takes the wife *of the deceased;* but not the son whose *father's* assets are held by another."

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* According to some Hindu legislators, minority continues until after completion of the age of fifteen years, and others state sixteen as the term.

At the expiration of the term of minority, the son and son's son of a person deceased are bound to discharge the obligations of their ancestor; and other heirs are so, provided they take his assets: but under no circumstances is a *minor* answerable for such obligation: and so long as the minority continues, the property left by the deceased cannot be sold for the liquidation of any debt he may have contracted. This subject has been more fully discussed in the chapter treating of Minority, vol. i.

The law on this subject is more distinctly laid down in the *Mitácshará* and other authorities, in the chapter treating of the payment of debts.

City Chinsurah,
June 13th, 1815.

CASE XIII.

Q. A widow borrowed some money to defray the necessary expenses of her minor son, and executed a bond in the name of her son (with her own signature) to the creditor for the debt. In this case, according to law, is the bond valid and binding on the son?

Necessary debts contracted for an infant are binding on him.

R. Any bond which a mother, having contracted a debt for the maintenance of her minor son, may have executed in the name of such minor son in favour of the creditor, is valid and binding, according to the texts of *Vrihaspati* and other sages, cited in the *Vivádaratnácara, Vivádachintámani, Dáyatatwa,* and other authorities.

Authorities.

"A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge."

"A housekeeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family *during his absence.*"

Zillah Burdwan,
December 4th, 1817.

CHAPTER XI.

OF SALE.



CASE I.

Q. Of three brothers, whose patrimonial estate, consisting of real property, was joint and undivided, two sold a certain portion, being their own shares, without the consent of their associated brother, who, however, urged no objection at the time when the purchaser got the deed of sale registered and the estate transferred to his name in the records of the collector's office. In this case, is the sale good and valid, or otherwise?

According to the law of Bengal, unseparated coheirs may sell their own portions of an ancestral estate.

R. When the two brothers sold a portion of their shares of the undivided immoveable property, and when the property was transferred, the other brother expressed no objection to the transaction. It may therefore be inferred, that he was a consenting party thereto; but, even without his sanction, they were competent to sell their own shares; for they are masters of their own wealth. According to the doctrines of the *Dáyabhága, Dáyatatwa*, and other law books current in Bengal, the sale is good and valid.

Authorities.

The text of *Náreda*, as laid down in the *Dáyabhága:* "When there are many persons sprung from one man,

who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth*."

Dacca Court of Appeal, February 22d, 1820. }
Sudanunda Surma, *v.* Ramchunder Dutt.

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* The authority cited in this case would hardly appear to bear out the doctrine which it is adduced to support, though the passage in reality favours the construction in question, according to the following annotations upon it by Mr. Colebrooke, in his translation of the *Dayábhága.*

"The passage of *Náreda's* Institutes here cited, is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of *coheirs* who have made a partition. It is so expounded in the *Smritichandrica, Retnácara, Chintámani, Viramitrodaya,* &c. But in the present quotation, it is apparently understood as relating equally to divided and undivided shares."

"The author of the *Viramitrodaya,* giving a summary of this doctrine, says: '*Jimutavahana,* having cited two passages of *Vyása,* (See *Dáyabhága,* page 31, Section 27,) affirms, that they are not intended to incapacitate a single *coheir* from making a sale or gift; since he has property, defined to be a power of disposal at pleasure, in the case of immoveables, precisely as in that of other effects, and since those texts cannot declare null an actual gift consisting in the relinquishment of the property; for the fact cannot be altered by a hundred texts. But the prohibition is levelled against wicked persons, and is intended to declare the alienations sinful, because it is injurious to the family, if there were no sufficient cause for the alienation, such as the distress of the family, or the like. So the texts (See *Dáyabhága,* page 32, Section 29) relative to separated *coheirs,* must be explained as above. Accordingly *Náreda* authorizes generally a sale or any other alienation. Since the text specifies the reason, "because they are masters of their own wealth," it relates to immoveables; for it would else be impertinent."

CASE II.

Q. A landed proprietor died, leaving a widow, a minor son, and a son's son. Subsequently to his death, the widow sold her husband's immoveable property for the support of her minor son and son's son, and for the purpose of discharging the arrears of revenue due from the estate. Under such case, is the sale legal?

Sale by a widow of landed property is good, if necessary for the support of the family.

R. Should a woman, on her husband's demise, sell his landed property for the purpose of maintaining her minor son and grandson, and liquidating the arrears due to Government, the sale must be considered good and valid, for it is necessary to provide food and raiment to the minors, and to discharge the revenue of Government. This is conformable to the *Dáyabhága* and other authorities.

Zillah 24-Pergunnahs.

CASE III.

Q. Is property held jointly by several individuals, subject to be disposed of for the satisfaction of a decree passed against one of the proprietors?

" *Sricrishna* and *Achyuta* on the *Dáyabhága* of *Jimutavahana*, and *Cáshiráma* on the *Dáyatatwa* of *Raghunandana*, remark on *Náreda's* text: (13. 43.) 'This relates to gift or alienation by a well-disposed man. But the prohibition was relative to an ill-disposed person. Consequently there is no contradiction. It is here expressly declared that the gift or alienation is valid without consent of heirs. And thus the prohibition of gift or sale of the whole estate, unless in distress, must be understood as especially regarding immoveables, (land, &c.) rather than chattels, (gems, pearls, corals, &c.) But, if this relate to a man's own acquisitions, the preceding text (See *Dáyabhága*, page 29, Section 22) would be impertinent. For he had of course power over them, since they were acquired by himself.' "

Joint property is answerable for a debt to the extent of the debtor's share only.

R. Whatever be the legal share of the person against whom the decree had been passed, that alone can be sold, and the sale to that extent is only legal*.

Zillah Junglemehals,
June 28th, 1819.

CASE IV.

Q. A landed estate was held in joint tenancy by several individuals, and one or two of the partners joined in selling it, signing the name of one minor sharer of the property to the deed of sale. In this case, is the sale of the estate, with exception of the share to which the infant is entitled, good and valid, or is the entire sale null and void? Supposing the mother of the minor coheir to have consented to the alienation which had been made by his copartners, is the sale of the infant's share thereby rendered complete and binding, or otherwise?

The brothers of a minor are not competent to sell his share of the joint estate, even though the mother be consenting thereto.

R. If one or two of the coparceners, having sold the joint property, sign the deed of sale with their own names, and also with that of their copartner who is under age, the sale of the entire estate is not valid and binding, because all the partners have a right over it, and their property cannot be divested by individual alienation; but sale to the extent of the selling coparceners' shares is good and legal, as they are masters of their own shares, and had a partial right to the property sold. The sale of the minor's portion is null and void, even though his mother have consented to the alienation; for the property of an infant must be preserved until he comes of age. This opinion is conformable to the

* The answer to this question of course presumes that the debt, on account of which the judgment was given, had been contracted for the sole and exclusive benefit of the individual proprietor, and not on behalf of the family at large.

Dáyabhága, Dáyatatwa, Vivádachintámani, Vivádabhangárnava, Dwaitanirnaya, and other legal authorities.

Authorities.

Náreda says: "A gift or sale thus made by any other than the true owner, must, by a settled rule, be considered in judicial proceedings, as not made."

Catyáyana:—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner."

Zillah Nuddea,
June 9th, 1817.

CASE V.

Q. A person had six sons, and died, leaving some immoveable property acquired by himself. The *zemindaree* was settled in the name of the eldest son. On his death, all the sons, having lived in a state of union, enjoyed the produce of the estate. The eldest of them, in whose name the settlement of the estate was made, died, leaving two sons, who, subsequently to their father's death, lived with their uncles as a joint family in the same manner as their father had done. In this case, were the eldest brother's sons entitled to sell such property or not? If they have sold, is the signature of all the partners necessary to the validity of the deed of sale, as evidence of their consent to the contract? Or, if the two nephews executed the document without the sanction or knowledge of their uncles, is the sale legal? Or, supposing five of the six partners to have signed the deed of sale, should the contract be nullified by reason of the non-attestation of the remaining partner?

The consent of all the partners is requisite to the sale of a joint estate, even though the name of one only may have been recorded as proprietor.

R. Where there are many partners of a patrimonial landed estate who live together as an undivided family, one of them cannot sell the whole property without the sanction of his coparceners. Though the settlement of the estate was recorded in the name of a single partner, this confers no exclusive right on the person in whose name the estate is registered in the public records. The sale by virtue of the deed which was executed without the consent or signature of all the partners, must be considered null and void. The authorities for this opinion are the texts of *Vyása* laid down in the *Dáyabhága* and *Dáyatatwa*:—"A single parcener may not, without consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family. Separated kinsmen, as those who are unseparated, are equal in respect of immoveables: for one has not power over the whole, to give, mortgage, or sell it."

If an undivided estate, being the property of six individuals, be sold by five parceners, without the consent of the sixth, the sale is illegal, even though it was made under a written instrument executed by all the rest*.

Zillah Cuttack,
March 25th, 1817.

CASE VI.

Q. There was a family, consisting of five uterine brothers, of whom two are adult, and the others under age. Is the eldest brother, in this case, competent to sell the ancestral landed estate which is in common, himself signing for his four brothers, as well as his own name, in the deed of sale? and supposing him to have sold it, is the sale legal, or otherwise?

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* Both stanzas are here ascribed by *Jimutavahana* (and similarly by *Srichrishna*) to *Vyása;* but the second is cited in the *Retnácara* as a text of *Vrihaspati.* See note to page 31. of the *Dáyabhága.*

R. If of the brothers some are adult and others minors, the eldest is competent to sell the paternal immoveable property for the maintenance of his minor brothers, for the performance of their initiatory ceremonies and so forth, for the exequial rites of his father, and for the discharge of the debts incurred by the father; but excepting under these circumstances, he cannot sell any portion exceeding his own share. If he should have made the sale, excepting under those circumstances, it must be considered void.

Circumstances under which a sale of the paternal estate by the eldest son during the minority of his brothers is valid.

Zillah Beerbhoom,
August 20th, 1818.

CASE VII.

Q. A landed estate was jointly held by two persons, and one of them being anxious to sell his own portion of the property, the other offered a proper price for it, but he nevertheless sold his interest to a stranger. Under these circumstances, is the sale valid and binding?

R. Supposing the landed property to have been held in joint tenancy by two persons, and, when one of them negotiated a sale to the extent of his own share, his coparcener to have offered him the same price as settled by the purchaser, in such case, the property must be sold to the parcener, and if it should have been disposed of to a stranger, the sale must be set aside*."

Right of pre-emption recognized in joint property.

Moorshedabad Court of Appeal,
December 31st, 1816.

* According to the Hindu law, there is no right of pre-emption, either in the schools of Bengal, Benares, or Mithila; but the two latter forbid the sale of undivided property. I have not been able to discover any work which confirms the doctrine laid down in the *Muha-nirbana Tuntra* as to pre-emption, and I entertain some doubt as to the accuracy of this opinion. It appears at best to be founded rather on the inability of a coheir to sell his share of joint property than on the ground of vicinage; and in Bengal, as that inability does not exist, there could not, I imagine, be any legal claim of pre-emption. See Case 8.

CASE VIII.

Q. A deceased Hindu was survived by his adopted son, who sold his adopting father's landed estate to a stranger. The purchaser is now digging a tank in the land, and the adopting father's brothers claim the right of pre-emption, and want to purchase the property sold. In this case, will the sale by the adopted son become null and void, and are the claimants of pre-emption entitled to the estate?

There is no right of pre-emption according to the law of Bengal.

R. The sale of a person's own share of property, whether consisting of moveables or immoveables, is according to law valid and binding, and it cannot be avoided by the seller's uncle's sons claiming the right of pre-emption.

Authorities.

"If they severally give or sell their own *undivided* shares, they do what they please with their property of all sorts; for, surely, they have dominion over their own."

Zillah Burdwan,
December 3*d*, 1819.

Adwita Dutta, *v.* Kissenmohun Dutta and others.

CASE IX.

Q. A *Sudra* died possessed of some landed property, leaving a widow, a daughter, and a daughter's son. A part of the property had been usurped by a stranger; and the daughter's son of the proprietor, with the sanction of his grandmother, instituted a suit to recover possession of the portion usurped. In this case, will the property in question go to the daughter's son or not? Supposing the original proprietor's widow, notwithstanding she had a daughter and daughter's son living, to have disposed of a portion of her husband's landed estate by sale, without their

consent or knowledge, and not to have received the full value of the property from the purchaser; in this case, is the sale to be considered valid and binding, or otherwise?

Sale by a widow without the consent of the next heirs, of any part of the property devolved on her from her husband is invalid, except under special circumstances.

R. If a part of the deceased proprietor's immoveable property have been forcibly seized by a stranger, and his (the proprietor's) daughter's son have instituted a suit to recover the property from the hands of the usurper, with the consent of the proprietor's widow, the daughter's son is entitled to the property in dispute, by reason of his being next heir to the deceased. Either a gift or sale, or any other alienation of the immoveable property which had devolved on the widow, unless for the completion of her husband's exequial rites, or the like necessary observances, is illegal. Whatsoever sum may have been settled as the value of the property sold, if the whole amount had not been paid by the vendee, the sale must be held invalid.

Authorities.

Vrihaspati:—" A possession by strangers for three generations, gives no doubt, an absolute title; not a possession by kinsmen within the degree of *Sapindas*. The property of a house, arable land, a market, or other immoveables, which are possessed by a friend, or a near kinsman in the male or female line, who is not the proprietor, shall not be lost to the *rightful* owner, nor shall the husbands of daughters, nor learned priests, nor the king, nor his ministers, acquire a title even by a very long and quiet possession."

These texts are laid down in the *Dáyabhága* and other law works. Thus in the *Mahábhárata*, in the chapter entitled *Dánadharma*, it is said: " For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth." "Even use should not be by wearing delicate

apparel and similar luxuries: but since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized. In like manner, (since the benefit of the husband is to be consulted,) even a gift or other alienation is permitted for the completion of her husband's funeral rites. Accordingly the author says, 'Let not women make waste.' Here 'waste' intends expenditure, not useful to the owner of the property. Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property; or, if still unable, she may sell or otherwise aliene it: for the same reason is equally applicable*."

Catyáyana:—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." "Abiding with her venerable protector;" that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure." This is the opinion of the author of the *Vivádachintámani.*

Vrihaspati:—"What has been sold, at a low price, by a man inebriated or insane, or through fear, or by one not his own master, or by an ideot, shall be given back, or may be taken *forcibly* from the buyer."

City Dacca,
February 3*d*, 1817.

CASE X.

Q. There were three uterine brothers in joint possession of some ancestral landed property. One of them staid at

* *Dáyabhága*, p. 182.

home to conduct the affairs of the family, and superintend the estate, and the other two proceeded to a foreign country to obtain office. In this case, is the brother who manages the estate, entitled to sell or mortgage the property for a certain term, while the other brothers are at a distance ?

The sale by the managing partner of an entire estate is valid in a case of necessity.

R. If two of the three associated brothers, having left a brother at home to manage their joint property, proceeded to a distant country to obtain office, the managing brother may mortgage and sell the whole or a part of the undivided patrimonial property for the support of the family and religious purposes, even though there be no consent on the part of his coparceners; in like manner as he may, without his brother's sanction, dispose of his own share for the maintenance of his own dependants. This is conformable to the *Dáyabhága, Dáyacramasangraha,* and other legal authorities.

Authorities.

" But if the family cannot be supported without selling the whole immoveable and other property, even the whole may be sold or otherwise disposed of." *Vrihat Menu.* " The support of persons who should be maintained, is the approved means of attaining heaven: but hell is the man's portion, if they suffer. Therefore (let the master of a family) carefully maintain them." This is the doctrine contained in the *Dáyabhága.*

" Should even a slave make a contract *in the name of his absent master* for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it." " The term 'contract' means sale and the like." *Dáyacramasangraha.*

" But, at a time of distress, for the support of his household, and particularly for the performance of religious duties, even a single coparcener may give, mortgage, or sell the immoveable estate."

" If a debt be incurred by a slave for the support of the family of his master, it must be discharged by the master." This is the opinion of the author of the *Vivádachintámani.*

" For here also, (in the very instance of land held in common,) as in the case of other goods, there equally exists a property, consisting in the power of disposal at pleasure." Accordingly *Náreda* says: " Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." This is the doctrine of the *Dáyabhága.*

" *As in the case of other goods:*" " Meaning goods which are common." " *Here also:*" " In the very instance of land held in common." " *Equally exists:*" Intending that there is no distinction of ownership. Since therefore there is no general property of parceners in the whole estate, it is fallacious to suppose that a plurality of owners constitutes community, and community must therefore be considered as meaning the state of not being separated. For as propriety exists in the common property, even before partition, there is nothing to prevent the gift or other alienation by a parcener of his own share, even at that time. This is the opinion entertained by the author of the *Dáyabhága,* who maintains a partial right to a certain portion (of the estate ascertained by partition) vested in each individual owner. Accordingly *Náreda* says, " Should they give or sell their own shares," and thereby shews, that in transactions about to be concluded by one parcener, he has the power to give or otherwise dispose of

his own share, without the consent of the rest. This is the opinion also of the author of the *Dáyacramasangraha.*

Calcutta Court of Appeal,
January 13*th,* 1817.

Goopeekanth Thakoor, *v.* Cumulakanth Thakoor and others.

CASE XI.

Q. A landed proprietor sold his estate to the plaintiff's father, and he executed a deed of sale for the same in the purchaser's favour; but, when the sale was contracted, the estate was under a mortgage, on which account the seller was unable to deliver the property sold into the purchaser's possession. Five years after the transaction, the vender sold the same estate to the defendant, and having redeemed the mortgage with the purchase money, delivered it to the defendant (the second vendee), who is still in possession of the estate. In this case, will the property in question revert to the first purchaser, or will it remain with the second one?

A sale of mortgaged property is valid, and becomes complete on discharging the incumbrance.

R. If a person having sold his lands to one individual, again sell the same property to another person, the first purchaser is entitled to the property. This is consistent with the general opinion*.

Zillah Chittagong,
July 30*th,* 1813.

Magun Doss, *v.* Mudunmohun and others.

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* "In all other contested matters, the latest act shall prevail; but, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force." It may be objected, that according to this doctrine, the first sale should be avoided by the mortgage, from its having been made previously to the sale. The meaning of the text, however, is, that where a person mortgages his property for a valuable consideration to one person, and mortgages the same property to another, the first mortgage shall hold good; but in a case where a man mortgages

CASE XII.

Q. There were three uterine brothers, who held their patrimonial lands in joint tenancy. Two of the brothers died, each leaving a widow, and the other brother still survives. The estate is jointly possessed by these individuals. The widows, being much distressed for the means of maintenance, sold a part of their husbands' shares of the joint landed estate, without the consent of their husbands' brother, and appropriated the purchase money to their own use. In this case, is the sale good and valid?

The sale by a widow of her husband's landed property is valid, if necessary to her maintenance.

R. The text of *Vrihaspati* cited in the *Dáyabhága*:—"Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brethren be present."

"Therefore the widow of a person dying without male issue takes his entire heritage, even though his father and brother be living, because she confers benefit on her deceased husband by preserving her life with the enjoyment of his wealth, and by offering oblations to his manes: and if she, having become indigent, defile her chastity, then hell becomes her husband's portion. Under these circumstances, the preservation of her chastity and life is absolutely necessary. If, with the produce of their husbands' estate, their maintenance cannot be supplied, they (the widows) for the purpose of acquiring the means of subsistence, may mortgage or sell a portion of their husbands' landed estate, and the sale in such case is legal and valid.

August 27th, 1808.

Dowlut Singh, *v.* Bukhtawur Singh.

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his property, and subsequently makes a sale of the same property, the latest contract will have superior force, on the satisfaction of the debt for which the property was mortgaged: in other words, that a prior pledge shall avoid a subsequent pledge, not that a prior pledge shall avoid a subsequent gift or subsequent sale.

CASE XIII.

Q. Are *Devutter* lands and houses appropriated to religious uses, fit subjects of sale or not?

The sale of endowed property is void.

R. If the lands have been endowed for the worship of some deity, and the house be occupied by it, the donor has no right in the endowment, and consequently he is incompetent to sell such property. The following is the doctrine laid down in the eleventh section of the *Srimadbhagavata:* "He who seizes the subsistence of the gods or of priests, whether given by himself or another, is born a reptile in ordure for a million of million years."

Dacca Court of Appeal,
November 27th, 1820.

CASE XIV.

Q. Is a minor competent to sell his ancestral landed estate or not? Supposing him to have executed a deed of sale, and not to have received the sum stipulated in it; in this case, is the sale valid and binding?

Sale by a minor of his landed property is void.

R. A minor has no power to sell his immoveable property; and if he have not received the amount specified in the bill of sale, the sale is invalid.

Zillah Junglemehals,
May 14th, 1817.

CASE XV.

Q. Can a slave sell his daughter of three years old, while his master is living?

The sale by a slave of his own issue is void.

R. A slave is not competent to sell his issue without his master's consent, and the sale under such circumstances is illegal and void.

Zillah Sylhet,
December 2d, 1815.

CASE XVI.

Q. A family, consisting of three brothers, held a patrimonial landed estate in joint tenancy, the eldest of whom, without coming to a partition, sold a moiety of the estate, with the consent of his youngest brother, but without the consent of the second brother. In this case, is the eldest brother competent to sell such property; and if it be sold, is the sale good and valid, according to the law as current in Orissa?

According to the law as current in Orissa, the sale of a portion of joint property is void.

R. The eldest brother is incompetent to sell one half of the joint patrimonial real estate without coming to a partition, or defining his legal share, having only the sanction of his youngest brother; and the sale in such case is null and void*.

Zillah Midnapore,
March 15*th*, 1813.

* According to the authorities as current in Bengal, the sale of joint immoveable property by one of the parceners, to the amount of the seller's share, is not forbidden; and if he sell the whole estate, the sale is not valid, so far as regards the shares of his other partners, but is valid so far as regards his own share; and if it be disposed of with the consent of all or some of the coparceners, the sale is valid, so far as regards the shares of the consenting partners; consequently the sale of the moiety of the joint property by the eldest brother, with the sanction of the youngest only, could not have been nullified, had the case happened in Bengal, by reason of his selling the property over which he had no exclusive right. In support of this opinion, the following extracts from Juggunnath's Digest may be here cited.

" It is questioned whether his own property be or be not annulled by the act of a single parcener. It should not be said, that his own property is not annulled, because the gift, being improperly made, is in its own nature imperfect, and is void, as the act of a man partly destitute of ownership. There is nothing to prevent the annulling of *his own* property, since the gift, which he himself makes with the intention of annulling the rights of all the parceners in that chattel, is the act of an owner, of whom property is predicable. Consequently

CASE XVII.

Q. A person having borrowed a certain sum of money, mortgaged his landed estate for the same, and afterwards the mortgagor sold the same estate to another individual without liquidating the debt; but the property mortgaged was taken possession of by the mortgagee after the sale. In this case, is the sale, without the discharge of the debt for which the property was pledged, valid and complete; or is the mortgagee to retain possession of the property mortgaged until his claim be satisfied?

Mortgaged property cannot be alienated by the mortgagor, except under certain conditions.

R. If a person mortgaging his immoveable estate to another, contract a debt to him upon condition that until he (the debtor) discharge the debt, the mortgage should not

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the ownership of the giver appears in this instance to be alienable: but the ownership of the rest subsists in full force. The meaning of ancient authors, who hold a gift of joint property to be void, is the same. But a parcener's gift of his own share is valid. All the brothers have each their respective predicable property in all the effects."

"Joint property is wealth belonging to more than one owner. *Misra* says, the gift is invalid, because a man has not full dominion over joint property, a wife, or a son; and the want of dominion, *in the other instance*, is *deduced* from the *same* reasoning, *which proves it in the case* of joint property. By "the same reasoning," he means that the ownership of one cannot be annulled by another. From *Misra's* exposition it is inferred, that a parcener's gift of his own share of undivided property is void. But, to reconcile the two opinions of different authors, we adopt the sense inferrible by reasoning, and say; a gift of the whole joint property is void, not a gift of the parcener's own share:

"Thus the donor cannot, at his own choice, annul the ownership of others; but he is not debarred from aliening his single right in the joint property; for such acts by partners in trade are often seen in common practice. This may be stated as the opinion of *Vachespati Bhuttachárjya* and *Vijnyaneswara*. Therefore the gift is valid, as far as the donor's share is concerned; but he shall be punished, and must perform penance."

be redeemed; in this case, the sale or gift of such property, previously to the fulfilment of the condition, is illegal, and the mortgagee may keep the property in his own possession. But if the mortgagor, without redeeming the property, be desirous of giving or selling it, it is necessary for him first to give an order on the donee or vendee for the payment of the debt, and to get that order accepted by the mortgagee, in which case he may dispose of the mortgaged property by gift or sale; and by doing so, the debt becomes due from the donee or vendee, and he (the donee or vendee) then stands in the place of the mortgagor. The mortgagee is competent to keep the property in his hands until the whole amount of the debt be satisfied. This is consonant to the *Mitácsharà* and other works.

Authorities.

"Nor after a great length of time, *or when the profits have amounted to the debt,* can he assign or sell such pledge*".

"To the debtor, who comes to redeem his pledge, the creditor shall restore it, or be punished as a thief; and, if the creditor be *dead or absent,* the debtor may pay the debt to his kinsmen, and shall take back his pledge†."

"In this case, the creditor returning from abroad may restore the pledge, on receiving so much money *as was due when the pledge was valued.*" This is laid down in the *Mitácsharà* and other authorities.

Zillah Agra,
July 13*th*, 1809.

* Last stanza of a text of *Menu*.

† *Yájnywalcya.*

CASE XVIII.

Q. A person was survived by two sons and a widow. In this case, to what proportion of his property, moveable and immoveable, are these persons respectively entitled; and can the sons, without coming to a partition of the paternal estate with their mother, legally make a sale of the whole of the property?

Sons are not at liberty to sell their mother's portion.

R. According to law, the widow and the sons are entitled to equal shares of the deceased's property, and neither party is competent to sell the other's share without the consent of the other. If one of them be desirous of selling his own portion, he may do so after having come to a partition with his coheirs. Should one parcener sell the share of another without his sanction, both the seller and purchaser are subject to punishment (by the ruling power) commensurate to their offences.

Zillah Moradabad,
June 29th, 1819.

CASE XIX.

Q. A person leaving a widow and a son, died possessed of some landed property in joint tenancy. Subsequently to his death, his son died childless, and his share of the joint property was illegally taken possession of by his father's brother's sons. The widow made a gift of the property in question to her daughter's son, and having joined with him (the donee), sold it to a third person. In this case, is the sale legal and valid?

Sale by a widow with consent of next heir is valid.

R. Under the circumstances stated, the sale of the joint property by the widow, with the consent of her heir, being the grandson of the female line, is good and valid*. This is consonant to the *Smriti Shástra.*

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* It is a general rule, that every description of alienation by a female of property devolved on her by inheritance is forbidden; but she

Q. Supposing the widow, with the assent of her daughter's *minor* son, to have contracted the sale; in this case, is the sale legal or otherwise?

R. If the widow have sold the property for the purpose of procuring the necessaries of life, or from being unable to manage the estate, with or without the assent of her minor, unless such heir was a minor grandson in the female line, the sale is valid; but under other circumstances, if she have sold the property unnecessarily, with or without the minor's assent, should he be desirous to nullify the alienation, he may do so, and the sale made by her will become void.

City Moorshedabad,
August 23*d,* 1822.

CASE XX.

Q. A, B, and C are three brothers, proprietors of an undivided landed estate. A dies, leaving a son D; B dies, leaving a son E; and C dies, leaving a son F. F dies, leaving four sons. On the death of A, the estate was registered in the name of D; and during the minority of the sons of F, it was about to be sold by public auction on account of arrears of revenue. With the view of saving the estate, D, in concert with E, made a mortgage and conditional sale of it to a stranger, and the conditional sale ultimately became absolute, in consequence of the money borrowed not being repaid to the mortgagee within the stipulated period. Now the heirs of F have sued to recover their share, alleging that

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may make a transfer for certain purposes, and also with the consent of her husband's next male heir. But if a widow, having succeeded her husband, should dispose of his property by gift or other alienation, with the sanction of her husband's next male heir, and the heir consenting, die before the widow; it might be a question, whether, on the death of the widow, her husband's heir, male or female, who has the right to succeed in default of the consenting party, would be entitled to annul the contract made by the widow.

the sale took place without their consent, and during their minority. Is such sale, made during the minority of the heirs of F, valid according to law?

R. D and E being the elder brothers of the family, and managers of the affairs, and having disposed of the property in a time of distress and through necessity, such act is valid; and here the sale is good, because the estate was disposed of to prevent its being sold by public auction.

A sale by one partner of an undivided estate, if justified by necessity, is good and binding upon the other partners.

Authorities.

"Even a single individual may conclude a donation, mortgage, or sale, of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes." The text of *Yájnyawalcya* cited in the *Mitácshará, Calpataru,* and other authorities current in Behar.

Zillah Shahabad
April 1*st,* 1820.

Heirs of Goodree Singh, *v.* Gooman Singh and Bustee Singh.

CASE XXI.

Q. A woman, during the lifetime of her insane husband, sells a portion of his landed property for the purpose of performing the funeral obsequies of her mother-in-law. In this case, according to law, is the sale complete and binding?

R. Should a wife sell a portion of her husband's estate, he being childless, and of confirmed insanity, for the purpose above stated, such sale is good in law.

Sale by a wife of her insane husband's estate when valid.

Zillah Sylhet,
November 26*th,* 1817.

Sibpersaud, *v.* Sooberna Dassea.

CASE XXII.

Q. Can a person, having a son, a daughter, and a wife, sell his whole ancestral landed estate to a stranger?

Sale of a man's entire property allowable under what circumstances.

R. If a father, having sons and other heirs, sell his entire patrimonial immoveable property without their consent, or without extreme necessity, such as to render the sale necessary for the purpose of the family support, the sale is void and illegal; but under such necessity the act is allowable. This opinion is conformable to the *Vivádachintámani, Vivádaratnácara, Vivádachandra,* and other authorities.

Authorities.

Catyáyana :—" A wife or a son, or the whole of a man's estate, shall not be given away or sold without the assent of the persons interested ; he must keep them himself; but in extreme necessity, he may give or sell them *with their assent ;* otherwise, he must attempt no such thing : this has been settled in codes of law. Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, *whether fixed or moveable ;* otherwise it may not be given."

If the sons and the family cannot be supported without selling the whole real estate, or if the father, reserving such portion as may suffice for the maintenance of the family, sell the entire patrimonial landed estate, the sale is good and legal.

Dáyabhága :—" But if the family cannot be supported without selling the whole immoveable and other property, even the whole may be sold, or otherwise disposed of."

Zillah Nuddea,
May 12th, 1817.

CASE XXIII.

Q. A landed estate was purchased jointly by A and B. The latter died, leaving his four sons, namely C, D, E, and F. Subsequently to B's death, one of his sons, F, died leaving a widow. Afterwards the surviving three uterine brothers (C, D, and E,) and A sold the whole estate. In this case, is the sale of such property, without the sanction of F's widow, valid and binding, or not? And has the widow any right over it, or is she only entitled to food and raiment from her husband's brothers?

Circumstances under which three brothers can effect the sale of an estate without the consent of the widow of a fourth brother.

R. Supposing F to have been separated from his brothers by obtaining a division of the estate, and then to have died, in that case, his widow is entitled to his estate. If no separation between F and his brothers took place, or if he, having separated from his brethren, reunited with them, his widow can only have her maintenance from her husband's brothers until her death. If after partition there was a reunion with one only of the brothers, the reunited parcener is alone bound to provide his coparcener's widow with maintenance; and under these circumstances, the widow's consent is by no means necessary to the validity of the sale.

Zillah Moradabad,
April 27th, 1813.

CASE XXIV.

According to the law of Bengal, the sale by one parcener of his own undefined share of an estate is good and valid.

Q. Two brothers are living in the same house, and joint sharers of an undivided estate. One of them disposes of his unascertained share of the estate by a deed of sale to a stranger. Is such sale good against the heirs of the other? An answer to this question is required to be delivered according to the law of Bengal.

A. Such sale is good and valid.

Authorities.

Authority for the above opinion.

1. Although the two texts of *Vyasa* are quoted in the *Dáyabhága*:—"A single parcener may not, without consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family," and "separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole, to give, mortgage, or sell it;" yet the author proceeds to state, it should not be alleged that by these texts one person has no power to make a sale or other transfer of such property. For here also (in the very instance of land held in common), as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure. But the texts of *Vyasa* exhibiting a prohibition are intended to shew a moral offence: since the family is distressed by a sale, gift, or other transfer which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer. *Dáyabhága.*

Ditto.

2d. Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth. Text of *Náreda* cited in the *Dáyabhága.*

3d. The gift or other transfer of immoveable property even, whether divided or undivided, is valid, because it is practicable to ascertain the respective shares at a subsequent period by the casting of lots or other means. Commentary of *Sricrishna Tarcálancára* on the *Dáyabhága.*

Sudder Dewanny Adawlut,
April 8th, 1815.

Byjnath Bunhoojea, Appellant, *v.* Sumbhoochund Bunhoojea, Respondent*.

* N. B. This opinion was delivered in opposition to that of the Pundit of the city court of Patna, who had ruled, that a sale by an un-

CASE XXV.

Q. A widow of the fourth class who had no son, having reserved some immoveable property left by her husband for her own maintenance, disposed of the remainder by a deed of gift in favour of her husband's brother's sons, her own daughter's son being present at the time, and not objecting. Fifteen years after the gift, she sold the property (which had been already given) to a stranger, and the deed of sale was attested by her daughter's son. In this case, which of these transactions should be upheld?

Prior gift invalidates subsequent sale after the lapse of fifteen years.

R. It may be inferred that the donor's daughter's son consented to the gift, from his making no objection at the time, or during the period of fifteen years subsequently to the gift. The gift, therefore, should be considered valid and binding. The sale which was witnessed by the daughter's son cannot be considered complete, for there existed no right in the widow over the property sold. Both gift and sale are the means of the extinction of property. Here the first act, in other words, the gift, shall prevail.

Authorities.

The following are the texts of *Náreda, Catyáyana,* and *Vrihaspati:*—" If a man, having bailed or pledged a thing to one person, pledge or sell it to another, the first act shall prevail." " In all *other* contested matters, the latest act shall prevail; but, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force*."

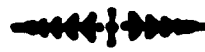
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separated coparcener of his own unascertained share of the joint undivided estate is not valid, and quoting the above texts of *Vyasa* in confirmation of his opinion.

* *Yájnyawalcya.* See Digest, vol. ii. page 78.

CHAPTER XII.

OF EVIDENCE.



CASE I.

Q. 1. A person purchased some male and female slaves, and obtained a deed of sale for them, with the attestation of the seller's other slaves as witnesses. Subsequently a dispute arose between the parties, and the purchaser brought an action against the seller and the slaves purchased, and pointed out the seller's other slaves as those who witnessed the bill of sale, and could depose in his favour. In this case, is the evidence of such slaves good and legal?

R. 1. Under the circumstances stated, the seller's slaves' evidence on the part of the plaintiff is good and legal.

A slave may be witness against his master,

Q. 2. In a suit instituted for slaves, whether male or female, the suing party produces his own slaves to prove his claim. Is the evidence of such slaves good and valid?

R. 2. The evidence of a slave for his master cannot in any case be held to be admissible.

but not for him.

Q. 3. Is the evidence of the slaves of the plaintiff's relations admissible in his behalf?

The slaves of the plaintiff's relations are good witnesses.

R. 3. The evidence of the slaves of the plaintiff's relations is good in law; and there does not exist, on the score of such relationship to the plaintiff, any objection to the testimony of the slaves on his behalf being received.

Zillah Tipperah,
July 5th, 1813.

CASE II.

Q. A person produced a witness (who was indebted to him) to depose in his favour in a court of justice. In this case, is the debtor's evidence good for the creditor or not?

A debtor may give evidence in favour of his creditor.

R. The debtor's evidence in behalf of his creditor is available, provided he depose impartially, and there exist no other objection to his competency.

Zillah Sylhet,
September 15th, 1817.

Chakooram Surma, *v.* Boodh Sing and others.

CASE III.

Q. A person instituted a suit, claiming a cow, alleging that it had been pledged to him: and his adversary, denying the pledge, pleads that he had purchased the animal, and wishes to prove his plea by the evidence of the plaintiff's wife, daughter, mother, and sister. In this case, are such females good and legal witnesses?

A defendant cannot avail himself of the evidence of the plaintiff's female relations.

R. If in the case above mentioned, the defendant met the plaint by the special plea* *(Pratyavascundana)*, that he had purchased the animal, and wished to prove such

* A confession, a denial, a special exception, and a plea of former judgment, are the four sets of answer. *Mitácshará.* For further information on this subject, see the chapter on Judicial Proceedings, &c. vol. i. which contains a summary of the Hindu law relative to evidence and other legal topics.

plea by the evidence of the plaintiff's wife, daughter, mother, and sister, the evidence of those individuals is not available in law.

Zillah Jungle Mehals,
February 7th, 1817.

CASE IV.

Q. A woman, having committed adultery with her husband's brother, brought an action against him for maintenance, and selected his (the defendant's) wife to prove the fact in question. In this case, is the evidence by a single female valid or not?

In the case of a female, the evidence of a single female is admissible.

R. If the woman, having committed adultery with her husband's younger brother, sue him for her maintenance, and produce the defendant's wife as evidence, the case being that of a female, the evidence of a single female is good and legal.

Zillah Jungle Mehals,
February 7th, 1817.

CASE V.

Q. Is it lawful to receive in evidence the deposition of a person afflicted with leprosy?

A leper cannot be a witness.

R. The testimony of a leper is not admissible.

Zillah 24-Pergunnahs,
November 9th, 1808.
Bidianath Haldar, *v.* Hurchunder Haldar and others.

CASE VI.

Q. The plaintiff has no evidence to prove the truth of his allegations, and wishes, as a test, to enforce the oath of the defendant. In this case, should an oath be administered to the defendant?

A defendant's denial may be required on oath, in default of other evidence.

R. According to the doctrine of *Menu*, *Yájnyawalcya*, and other holy sages cited in the *Mitácshará* and other authorities, an oath should be administered to the defendant*.

Zillah Moradabad, *March 22d*, 1804.

Manikchurn Brahmin, *v.* Gunganarain and others.

* But this doctrine must be received with some limitation. Ordeals of any kind should not be resorted to, except on failure of all other evidence; and there are various descriptions of ordeal applicable to particular cases, for an account of which see the chapter on Judicial Proceedings, &c. vol. i.

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Page 107. 2d side note, l. 4, *for* "sons' mother," *read* "sons, as mother."
„ 138. bottom note, l. 2, *for* "Bhahmin," *read* "Brahmin."
„ 173. side note, l. 3, *for* "parttiion," *read* "partition."
„ 180. side note, l. 8, *for* "husbhnd," *read* "husband."
„ 218. side note, last line, *for* "stipula-," *read* "stipulated."

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